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# TRANSCRIPT OF RECORD

## Supreme Court of the United States

OCTOBER TERM, 1930

## No. 362

GASOLINE PRODUCTS COMPANY, INC.,
PETITIONER,

*vs.*

CHAMPLIN REFINING COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 19, 1930

CERTIORARI GRANTED OCTOBER 20, 1930

(35,284)

(35,284)

# SUPREME COURT OF THE UNITED STATES

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[fols. 1-3] [Captions omitted]

[fol. 4] **IN UNITED STATES DISTRICT COURT, DISTRICT OF MAINE**

PLAINTIFF'S MOTION TO SUBSTITUTE DECLARATION FOR BILL IN EQUITY—Filed January 26, 1928

Now comes Gasoline Products Company, Inc., complainant in the above entitled cause brought upon the equity side of this Honorable Court, and, upon the granting of the defendant's motion to transfer said cause from the equity to the law side of the Court, moves to amend its bill of complaint by substituting for the same a declaration in an action at law in a plea of covenant broken, as follows:

"for that on or about the twenty-sixth day of February, 1926, at New York in the County and State of New York, to-wit, at Portland in the County of Cumberland and State and District of Maine, the defendant herein, said Champlin Refining Company, a corporation duly created, organized and existing under the laws of the State of Maine and having its principal office in the City of Augusta in the State and District of Maine, and a citizen and inhabitant of said State of Maine, entered into an agreement in writing under seal in court to be produced with the plaintiff herein, a corporation duly created, organized and existing under the laws of the State of New York and having its principal office and place of business at 52 Broadway, New York City, and a citizen and resident of the State of New York, a copy of which contract marked 'Exhibit A' is hereto annexed and made a part hereof, whereby the plaintiff granted to the defendant a non-exclusive license under the United States letters patent and application for letters patent more fully described and set forth in the schedule annexed to and made part of said contract to construct and operate at the plant of the defendant at Enid, Oklahoma, two Cross cracking units for cracking petroleum oils to produce motor gasoline; said license was granted by the plaintiff to the [fol. 5] defendant upon the condition that within one year from the date thereof the defendant should complete the construction, erection and equipment of said two Cross

cracking units in conformity with plans and specifications prepared and furnished or approved in writing by the plaintiff or its duly authorized representative and the defendant by its said agreement in writing promised and agreed to pay the plaintiff as royalty for the rights granted a sum equal to ten cents per barrel of forty-two gallons each at sixty degrees Fahrenheit for each and every barrel of all oil passed through or treated in the units constructed and operated pursuant to said license including 'recycled' oil defined as oil 'treated or partially treated by being passed through a unit,' such royalties to be payable at the office of the plaintiff in New York monthly prior to the tenth of each month for the operations of the defendant during the preceding calendar month; and the defendant further agreed that it would at its own expense equip said apparatus with a meter or meters approved as to type and location by the plaintiff in writing suitable to measure accurately the number of barrels of oil passed through or treated in said apparatus unless some other method of measuring were agreed upon between the plaintiff and the defendant, and the defendant agreed that on or before the tenth day of each month it would submit to the plaintiff a written statement of the total number of barrels of oil passed through or treated in said apparatus during the preceding calendar month and that such statements should have annexed thereto a record of the daily reading of said meter or meters for each day of the month covered by said statement; and the defendant entered into divers other agreements, undertakings and covenants as more fully set forth in said written contract Marked 'Exhibit A' im-[fol. 6] material to this action, and the defendant further agreed that said written agreement embodied the entire understanding of the parties and that said agreement was induced by no representations, statements, warranties and agreements other than those specifically expressed in said written agreement and that there were no further or other agreements or understandings written or oral in effect between the parties relating to the subject matter thereof except a guaranty of operation contract dated on or about February 26, 1926. And the plaintiff avers that it has performed each and every covenant and condition of the said agreement on its part to be performed and that under and pursuant to said agreement the defendant did construct

and erect at its said plant at Enid, Oklahoma, two Cross units for the practice of the process described in said license contract in accordance with plans and specifications prepared and furnished to the defendant by the plaintiff and the defendant has been using said Cross units since on or about September 15, 1926, and has passed through and treated in said units including recycled oil as above defined, 540,587.05 barrels of charging stock as follows:

| | |
|---|---|
| September, 1926 | 37,001.44 |
| October, 1926 | 66,385.98 |
| November, 1926 | 99,989.74 |
| December, 1926 | 105,438.50 |
| January, 1927 | 117,477.16 |
| February, 1927 | 117,293.68 |

but the defendant has failed, neglected and refused to pay to the plaintiff the royalty of ten cents per barrel as promised and agreed in its said license agreement although the plaintiff has frequently made demand for such payment; and the plaintiff avers that by reason of the foregoing the defendant became obligated to pay to the plaintiff the sum [fol. 7] of $54,058.70, principal, with interest thereon as follows:

Interest on $3,700.14 from October 10, 1926, to the date hereof;

Interest on $6,638.60 from November 10, 1926, to the date hereof,

Interest on $9,698.97 from December 10, 1926, to the date hereof;

Interest on $10,543.95 from January 10, 1927, to the date hereof;

Interest on $11,747.72 from February 10, 1927, to the date hereof;

Interest on $11,729.37 from March 10, 1927, to the date hereof.

To the damage of the plaintiff as it says of one hundred thousand dollars ($100,000) which shall then and there appear with other due damages."

By Its Attorneys, Verrill, Hale, Booth & Ives.

## Exhibit "A" to Motion to Substitute

License Agreement, Champlin Refining Company, Enid, Oklahoma, Licensee, with Gasoline Products Company, Inc., New York, N. Y., Licensor

February 26, 1926

This agreement, made this 26th day of February, 1926, between Gasoline Products Company, Incorporated, a New York Corporation, hereinafter called the Licensor, and [fol. 8] Champlin Refining Company, a Maine corporation, hereinafter called the Licensee:

Witnesseth:

Whereas, the Licensor represents and warrants that it is the owner of, or has the right to grant the non-exclusive license hereafter granted under certain Letters Patent of the United States now owned by the Gasoline Products Company, Inc., The Texas Company, the Standard Oil Company (Indiana), the Standard Oil Company (New Jersey) and the Standard Development Company, and under certain Lewis patents, relating to processes for treating hydrocarbons and the products derived therefrom and the apparatus used in connection therewith listed in Exhibit "A" annexed hereto and made a part hereof; and that it has the right to grant the said non-exclusive license under all United States letters patent hereafter acquired by said The Texas Company and Standard Oil Company (Indiana) prior to January 1, 1937, all United States letters patent hereafter acquired by the Standard Oil Company (New Jersey) and the Standard Development Company prior to January 1, 1937, and all United States letters patent of said Standard Oil Company (New Jersey) and said Standard Development Company, hereafter acquired by them and based on inventions made prior to October 1, 1933, which cover processes, apparatus and products practiced, used or made in the exercise of the said non-exclusive license granted hereby; and,

Whereas, the Licensee desires to obtain from the Licensor said non-exclusive license to make, use and sell under said letters patent above mentioned and under said after acquired patents.

Now, therefore, in consideration of the premises and of the mutual covenants hereinafter set forth, the parties hereto hereby covenant and agree as follows:

First. The Licensor hereby grants to the Licensee a non-exclusive license, upon the terms and conditions hereinafter [fol. 9] stated, under the above mentioned Letters Patent of the United States listed in Exhibit "A", under the said after acquired Letters Patent of the Texas Company, the Standard Oil Company (Indiana), the Standard Oil Company (New Jersey) and the Standard Development Company and under any Letters Patent of the United States hereafter acquired by the Licensor, to construct and operate in the manner hereinafter specified at its plant at Enid, Oklahoma, two (2) Cross cracking units having a total rated capacity of four thousand (4000) barrels throughput of charging stock (including recycled oil) per twenty-four (24) hours while on stream, for cracking petroleum oils to produce motor gasoline, in which a process of oil conversion characterized by the following is practiced:

The oil to be converted is heated to or above a cracking temperature while in transit through a heating tube or coil, and is then passed continuously into and through a reaction chamber in which cracking occurs without substantial distillation at a pressure of at least 425 pounds per square inch (above atmospheric measured in the reaction chamber), and from which a synthetic crude oil is withdrawn, and is permitted to attain a pressure of not more than 15 pounds per square inch above atmospheric without further treatment other than cooling, except that the synthetic crude may be discharged into a distillation drum or still open to the atmosphere through a condenser or other appropriate apparatus, no pressure regulating valve or other means for the purpose being used to maintain pressure on said distillation drum or still or condenser; and to treat and or refine any products produced by any such cracking process; but no license is hereby granted (a) under any Letters Patent of the Standard Oil Company (Indiana), the Standard Oil Company (New Jersey), or the Standard Development Company which relate to processes for chemically altering the molecular structure of oil, either to produce products not intended for motor fuel but primarily for other purposes, or other products in-

tended primarily for motor fuels but essentially different [fol. 10] in characteristics from cracked gasoline of the characteristics produced in January, 1923, by the Licensees of the Gasoline Products Company and/or the Licensees of the Standard Oil Company (Indiana) and/or the Standard Oil Company (New Jersey) and/or the Standard Development Company, for example, with respect to its "knocking" power, carbon-solvent power, or other chemical property aside from molecular weight; or (b) under Letters Patent of the Standard Oil Company (New Jersey) or the Standard Development Company covering refining processes generally used for cracked and uncracked products alike.

Second. Within one (1) year of the date hereof the Licensee agrees to complete the construction, erection and equipment of the said two (2) Cross cracking units, which shall be constructed, erected and used by the Licensee only in conformity with plans and specifications prepared and furnished, or approved in writing, by the Licensor or its duly authorized representative.

Third. (a) The Licensee shall pay the Licensor as royalty for the rights granted hereby a sum equal to ten cents (10c) per barrel of forty-two (42) gallons each for each and every barrel of all oil passed through or treated in said apparatus, including recycled oil as herein defined. Such throughput royalties shall be payable at the office of the Licensor in the City of New York monthly, prior to the tenth of the month, for the operations of the Licensee during the preceding calendar month.

(b) The Licensee may at any time during the life of this agreement, by written notice mailed to the Licensor or its office in the City of New York, elect to pay in lieu of further throughput royalties specified in sub-paragraph (a) of this paragraph Third, and in liquidation of all subsequent royalties payable for the rights granted hereby, a lump sum of Four Hundred and Fifty Thousand Dollars ($450,000.00) without deduction for any amount that may [fol. 11] theretofore have been paid as throughput or barrelage royalties. Such lump sum royalty shall be payable at the office of the Licensor in the City of New York within ten days after such notice shall have been given. Such

lump sum payment shall be deemed to be compensation in full of the Licensor for all royalties payable for all operations licensed hereunder of the apparatus specified above, including renewals and replacements but not enlargements thereof, during the whole of the then unexpired term for which this license is granted.

Fourth. The Licensee shall, at its own expense, equip said apparatus with a meter or meters approved as to type and location by the Licensor in writing, suitable to measure accurately the number of barrels of oil passed through or treated in said apparatus; or such other method of ascertaining the amount of all oil passed through each apparatus shall be used as is mutually agreed upon by the parties hereto, and said meter or meters, or such other measuring apparatus as may be agreed upon, may be inspected and tested by the Licensor at any time. On or before the tenth day of each month the Licensee shall submit to the Licensor a written statement of the total number of barrels of oil passed through or treated in said apparatus during the preceding calendar month and such statement shall have annexed thereto a record of the daily reading of said meter or meters for each day of the month covered by said statement, if meters are used. If the lump sum royalty specified in sub-paragraph (b) of paragraph Third above shall have been paid, the provisions of this paragraph Fourth shall be deemed to be cancelled from and after the date of such payment.

Fifth. In addition to the meter or other records provided for above, the Licensee shall keep accurate and complete records and accounts covering in detail the operations conducted in said apparatus. For the purpose of verifying the accounts provided for above and securing engineering and cost data useful in the development of the process and [fol. 12] apparatus hereby licensed, the duly authorized representative of the Licensor shall have the right at any and all reasonable times to inspect said apparatus and the operations conducted therein and all records and data of the Licensee relative to said apparatus and said operations, including the records required by this agreement to be kept by the Licensee; provided, however, that the Licensor shall not be entitled to inspect the records or accounts of

the Licensee dealing with the sale of the products or by-products of said apparatus or the prices charged or received by the Licensee therefor. If the lump sum royalty specified in sub-paragraph (b) of paragraph Third above shall have been paid, the provisions of this paragraph Fifth shall be deemed to be cancelled from and after the date of such payment.

Sixth. In the event that any suits are instituted against the Licensee for infringement of patents based solely upon the practice by the Licensee hereunder of the invention of any of the patents or applications under which it is hereby licensed in apparatus approved by, and operated in accordance with instructions of, the Licensor, the Licensee agrees to promptly notify the Licensor in writing of the institution of such suits and permit the Licensor to control the defense thereof. The Licensor will thereupon assume the defense thereof, the liability of the Licensor, however, being limited to the payment of the court costs as taxed and the compensation and expenses of counsel and experts of its own selection, provided, however, and it is hereby understood and agreed that the Licensee shall have the right to participate in the defense of any such suit by counsel of its own selection and that if the Licensor shall not actively prosecute such defense such counsel of Licensee may assume control thereof. The Licensee shall co-operate fully in the defense of such suits and to that end shall furnish all the evidence in its control. The Licensee shall also give the Licensor immediate notice of the making of any written claims of infringement.
[fol. 13] The Licensee covenants not to contest the validity of the Letters Patent under which is it hereby licensed, or the right or title of the Licensor thereto, or to aid others in so doing.

Seventh. Any and all improvements on any of the patents, applications, inventions or processes hereinbefore referred to, designed or otherwise obtained by the Licensee during the continuation of this agreement shall be the property of the Licensor and duly assigned by the Licensee to the Licensor, and the Licensee will execute and deliver to the Licensor upon its written demand any and all papers necessary or proper to vest in the Licensor title to all of

such improvements and all applications for Letters Patent filed or issued therefor. Upon the termination of this agreement, the Licensee shall have the shop right to use, but not to assign, any of said improvements, except as otherwise specifically provided herein, it being expressly understood and agreed that upon and after the termination of this agreement the Licensee shall have no right to use any of the patents, patent rights, processes, inventions and applications under which it is hereby licensed, or any part thereof, or improvements by others than the Licensee, in connection with such improvements of the Licensee or otherwise.

Eighth. The rights, privileges and license granted to the Licensee hereunder shall not be used either directly or indirectly otherwise than as provided in this agreement. The Licensee shall not assign this license or any part thereof or grant any sublicense thereof without the written consent of the Licensor. The Licensor agrees to give such written consent for the assignment of such rights, privileges and license by the Licensee to the purchaser from the Licensee of the apparatus to be erected in accordance with the provisions hereof, provided such purchaser shall have given to the Licensor its written undertaking to comply with all of the terms and conditions of this agreement and to perform the covenants and agreements of the Licensee as herein expressed. The Licensee agrees that the apparatus and [fol. 14] equipment constructed and acquired by the Licensee under the license hereby granted shall not be sold, transferred or assigned to any party who shall not have agreed to comply as aforesaid with the terms and conditions of this agreement.

Ninth. It is understood and agreed that if the Licensor shall hereafter issue any other license, other than a license to any of its present licensees whereby a lower rate of royalty is reserved for the same rights as are granted by this license, that then and in that event the Licensee shall have the benefit of such lower rate in respect to any further royalties payable by it without deduction for any payments theretofore made or accrued, so long as such license at such lower rate remains in effect and the royalties are paid thereunder.

Tenth. This agreement, except as above limited, shall be in force for the full term, or terms, of the United States patents now, or hereafter, owned by the Licensor upon any processes or inventions licensed hereunder unless sooner terminated as herein provided.

Eleventh. For the purpose of this agreement, a "unit" shall be taken to mean and include a cracking furnace, a reaction chamber and accessory equipment, lines and tanks, as shown by plans and specifications approved by the licensor; a "barrel" shall be taken to mean a barrel of forty-two (42) United States gallons at sixty degrees F. (60° F.); a "gallon" to mean two hundred and thirty-one (231) cubic inches at sixty degrees F. (60° F.); "recycled oil", oil which has been treated or partially treated by being passed through a unit; and where money is referred to United States currency is intended.

Twelfth. If the Licensee shall fail to pay the royalties hereinabove provided for, or any part thereof when due, or shall fail to perform any other of the covenants of this agreement by it to be performed, the Licensor may terminate this agreement and all rights, privileges, authority [fol. 15] and license hereby granted, by giving sixty (60) days' written notice to the Licensee to that effect, at the end of which time this agreement shall terminate unless during said time the Licensee shall have fully made good such default.

Termination for any cause shall not affect any right of action or remedy of the Licensor for the recovery of any monies then due hereunder on account of royalties or in respect of any antecedent breach of any of the covenants or agreements of the Licensee herein contained.

Thirteenth. The notices herein provided for shall be directed as follows:

Licensor: Gasoline Products Company, Inc., 52 Broadway, New York City, N. Y.

Licensee: Champlin Refining Company, Enid, Oklahoma.

Fourteenth. This agreement shall be binding upon and, except as otherwise herein expressly provided, shall inure to the benefit of the legal successors or representatives of the parties and to the assigns of the Licensor in accordance with the true intent and meaning hereof.

Fifteenth. The making, execution and delivery of this agreement by the Licensee have been induced by no representations statements, warranties, or agreements other than those herein expressed. This agreement embodies the entire understanding of the parties and there are no further or other agreements or understandings, written or oral, in effect between the parties, relating to the subject matter hereof, except a guarantee of operation contract of even date herewith. This agreement may be amended or modified only by an instrument of equal formality signed by the duly authorized officers of the respective parties.

In witness whereof the parties hereto have caused these presents to be executed on their behalf and their corporate [fol. 16] seals to be hereunto affixed and duly attested, by their respective officers thereunto duly authorized, the day and year first above written.

Gasoline Products Company, Inc., by C. H. Welling, Vice-President. Attest: W. S. Hood, Secy. (Seal.) Champlin Refining Company, by H. H. Champlin, President. Attest: D. W. Cotton, Secy. (Seal.)

Approved as to form J. B. Marsh.

State of New York,
County of New York, ss:

On this 9th day of March, 1926, before me personally came C. H. Welling to me known, who, being by me duly sworn, did depose and say: That he resides at New York City; that he is Vice-President of Gasoline Products Company, Inc., the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation and that he signed his name thereto by like order.

Guilietta Talamini, Notary Public. New York County Clerk's No. 190. New York Register's No. 6138. Term expires March 30, 1926. (Seal.)

[fol. 17] STATE OF OKLAHOMA,
County of Garfield, ss:

On this 19th day of March, 1926, before me personally came H. H. Champlin to me known, who, being by me duly sworn, did depose and say: That he resides at Enid, Oklahoma, that he is President of the Champlin Refining Company, the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

Daisy Ferguson, Notary Public. My Com. Expires: July 1st, 1927. (Seal.)

EXHIBIT "A"

## Gasoline Products Company Patents

| Inventor | Patent No. | Dated | Improvements in |
|---|---|---|---|
| Walter M. Cross | 1,203,312 | Oct. 31, 1916 | Process of treating hydrocarbons and products derived therefrom. |
| Walter M. Cross | 1,326,851 | Dec. 30, 1919 | Process of treating hydrocarbons. |
| Roy Cross | 1,423,500 | July 18, 1922 | Process of treating petroleum oil. |
| Roy Cross | 1,437,229 | Nov. 28, 1922 | Process of treating petroleum. |
| Walter M. Cross | 1,540,764 | June 9, 1925 | Apparatus for treating petroleum oils. |

## Lewis Patents

| | | | |
|---|---|---|---|
| Joseph W. Lewis | 1,364,443 | Jan. 4, 1921 | Method and apparatus for the treatment of petroleum. |
| Joseph W. Lewis | 1,472,075 | Oct. 30, 1923 | Petroleum treatment apparatus. |

## The Texas Company Patents

| | | | |
|---|---|---|---|
| William A. Hall | 1,175,909 | Mar. 14, 1916 | Process for the conversion of heavy hydrocarbons into lighter hydrocarbons. |
| William A. Hall | 1,175,910 | Mar. 14, 1916 | Process of making motor fuel. |
| William A. Hall | 1,194,289 | Aug. 8, 1916 | Process of cracking hydrocarbons. |
| William A. Hall | 1,239,099 | Sept. 4, 1917 | Hydrocarbon product. |
| William A. Hall | 1,239,100 | Sept. 4, 1917 | Liquid fuel. |

EXHIBIT A—Continued

| Inventor | Patent No. | Dated | Improvements in |
|---|---|---|---|
| [fol. 18] William A. Hall | 1,242,795 | Oct. 9, 1917 | Process for the production of motor-spirit from heavy hydrocarbons. |
| William A. Hall | 1,242,796 | Oct. 9, 1917 | Producing motor fuel. |
| William A. Hall | 1,261,930 | Apr. 9, 1918 | Art of converting hydrocarbon. |
| William A. Hall | 1,285,136 | Nov. 19, 1918 | Apparatus for making motor fuel. |
| Joseph H. Adams | 1,320,354 | Oct. 28, 1919 | Oil-converting apparatus. |
| Joseph H. Adams | 1,320,726 | Nov. 4, 1919 | Process for the conversion of liquids, fluids and oils. |
| Joseph H. Adams | 1,320,727 | Nov. 4, 1919 | Apparatus for the conversion of liquids, fluids and oils. |
| Joseph H. Adams | 1,327,263 | Jan. 6, 1920 | Process for the conversion of liquids, fluids and oils. |
| Joseph H. Adams | 1,428,311 | Sept. 5, 1922 | Oil converting process for the conversion and transformation of oils. |
| Joseph H. Adams | 1,428,312 | Sept. 5, 1922 | Oil-converting apparatus for the conversion and transformation of oils. |
| Frederick T. Manley | 1,428,338 | Sept. 5, 1922 | Apparatus for cracking hydrocarbon oils. |

| | | | |
|---|---|---|---|
| Frederick T. Manley | 1,428,339 | Sept. 5, 1922 | Method of cracking hydrocarbon oils. |
| Joseph H. Adams | 1,433,519 | Oct. 24, 1922 | Process for the conversion and transformation of liquids, fluids and oils. |
| Luis de Florez | 1,437,045 | Nov. 28, 1922 | Process of making motor fuel. |
| Joseph H. Adams | 1,445,281 | Feb. 13, 1923 | Apparatus for the conversion of oils. |
| Joseph H. Adams | 1,455,376 | May 15, 1923 | Process of converting oils. |
| Joseph H. Adams | 1,455,377 | May 15, 1923 | Oil-converting apparatus. |
| Joseph H. Adams | 1,461,017 | July 3, 1923 | Apparatus for the conversion and transformation of liquids, fluids and oils. |
| Frederick T. Manley | 1,462,143 | July 17, 1923 | Method of cracking hydrocarbon oils. |
| Joseph H. Adams | 1,462,677 | July 24, 1923 | Oil-converting process for the conversion and transformation of oils. |
| Joseph H. Adams | 1,462,678 | July 24, 1923 | Oil-converting apparatus. |
| Joseph H. Adams | 1,477,860 | Dec. 18, 1923 | Oil-converting apparatus for the conversion and transformation of oils. |
| Joseph H. Adams | 1,506,877 | Sept. 2, 1924 | Process for the conversion and transformation of liquids, fluids and oils. |

EXHIBIT A—Continued

| Inventor | Patent No. | Dated | Improvements in |
|---|---|---|---|
| Joseph H. Adams | 1,506,878 | Sept. 2, 1924 | Apparatus for the conversion and transformation of liquids, fluids and oils. |

Standard Oil Company (Indiana) Patents

| | | | |
|---|---|---|---|
| James S. Lang | 954,575 | Apr. 12, 1910 | Apparatus for distilling hydrocarbon oils. |
| William M. Burton | 1,049,667 | Jan. 7, 1913 | Manufacture of gasoline. |
| William M. Burton | 1,055,707 | Mar. 11, 1913 | Process of producing asphalt. |
| William M. Burton | 1,105,961 | Aug. 4, 1914 | Manufacture of gasoline. |
| [fol. 19] William M. Burton | 1,112,113 | Sept. 29, 1914 | Process for producing wax from other hydrocarbons. |
| Edgar M. Clark | 1,119,496 | Dec. 1, 1914 | Method of distilling petroleum. |
| Robt. E. Humphreys | 1,119,700 | Dec. 1, 1914 | Method of distilling hydrocarbons. |
| Robt. E. Humphreys | 1,122,002 | Dec. 22, 1914 | Petroleum-distilling apparatus. |
| Robt. E. Humphreys | 1,122,003 | Dec. 22, 1914 | Process of distilling petroleum. |
| Francis M. Rogers and Thos. S. Cooke | 1,122,220 | Dec. 22, 1914 | Means for controlling still-pressure in gasolene manufacture. |
| Edgar M. Clark | 1,129,034 | Feb. 16, 1915 | Art of petroleum distillation. |
| John B. Moore | 1,130,318 | Mar. 2, 1915 | Apparatus for distilling petroleum oils. |
| Edgar M. Clark | 1,132,163 | Mar. 16, 1915 | Art of petroleum distillation. |
| William M. Burton | 1,160,689 | Nov. 16, 1915 | Method of safeguarding stills. |

| | | | |
|---|---|---|---|
| William M. Burton | 1,167,884 | Jan. 11, 1916 | Petroleum product. |
| Charles S. Palmer | 1,187,380 | June 13, 1916 | Process of treating petroleum residues. |
| Gentry Cash | 1,230,065 | June 12, 1917 | Stuffing-box. |
| Charles S. Palmer | 1,313,009 | Aug. 12, 1919 | Process of treating petroleum residues, etc. |
| Robt. E. Humphreys and Wm. M. Burton | 1,343,674 | June 15, 1920 | Distillation of petroleum oils. |
| Charles S. Palmer | 1,360,973 | Nov. 30, 1920 | Process of treating coal, tar, heavy oils resulting from the distillation of bituminous coal, etc. |
| Edgar M. Clark | 1,388,514 | Aug. 23, 1921 | Distillation of petroleum hydrocarbons. |
| Frank B. Lewis and Thomas S. Cooke | 1,392,584 | Oct. 4, 1921 | Art of distilling petroleum oils. |
| Wm. M. Burton and Edgar M. Clark | 1,448,254 | Mar. 13, 1923 | Process of treating petroleum oils. |

Standard Oil Company (New Jersey) Patents

| | | | |
|---|---|---|---|
| Alfred A. Wells | 1,187,874 | June 20, 1916 | Cracking oil. |
| Carleton Ellis | 1,216,971 | Feb. 20, 1917 | Treating oils, etc. |
| Alfred A. Wells | 1,232,454 | July 3, 1917 | Process of decomposing oil. |
| Alfred A. Wells | 1,248,225 | Nov. 27, 1917 | Process of and apparatus for decomposing hydrocarbon oils. |
| Carleton Ellis | | | |
| Carleton Ellis | 1,249,278 | Dec. 4, 1917 | Treating oils. |
| Carleton Ellis | 1,317,868 | Oct. 7, 1919 | Process of making derivatives of petroleum hydrocarbons. |

EXHIBIT A—Continued

| Inventor | Patent No. | Dated | Improvements in |
|---|---|---|---|
| Carleton Ellis | 1,318,060 | Oct 7, 1919 | Motor-spirit. |
| Carleton Ellis | 1,318,061 | Oct. 7, 1919 | Process of making motor fuel. |
| Carleton Ellis | 1,341,975 | June 1, 1920 | Making gas oil. |
| Carleton Ellis | 1,396,999 | Nov. 15, 1921 | Making gasolene substitute. |
| Edgar M. Clark | 1,405,286 | Jan. 31, 1922 | Art of pressure distillation. |
| [fol. 20] Edgar M. Clark | 1,410,797 | Mar. 28, 1922 | Art of pressure distillation. |
| Edgar M. Clark | 1,413,899 | Apr. 25, 1922 | Refining of petroleum oil. |
| Carleton Ellis | 1,415,232 | May 9, 1922 | Process of cracking oils under pressure. |
| Edgar M. Clark, Nathaniel E. Loomis, and James R. Carringer | 1,478,102 | Dec. 18, 1923 | Art of treating oils. |
| **Black Patents** | | | |
| John C. Black | 1,426,813 | Aug. 22, 1922 | Process for the production of low boiling point hydrocarbons. |
| John C. Black | 1,431,772 | Oct. 10, 1922 | Process and apparatus for treating hydrocarbons to produce those of lower boiling points. |
| John C. Black | 1,447,118 | Feb. 27, 1923 | Process and apparatus for refining petroleum oil. |
| John C. Black | 1,456,419 | May 22, 1923 | Process and apparatus for the production of low boiling point hydrocarbons. |

IN UNITED STATES DISTRICT COURT

ORDER ALLOWING MOTION TO SUBSTITUTE, ETC.

Foregoing motion granted and declaration hereinabove set forth ordered substituted for bill of complaint originally filed.

John A. Peters, United States District Judge.

January 25, 1928.

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IN UNITED STATES DISTRICT COURT

DEFENDANT'S COMBINED ORIGINAL PLEA AND COUNTERCLAIM AND AMENDMENT TO THE SAME—Filed May 2, 1929

And the said Champlin Refining Company, defendant in the above mentioned action, by its attorneys, comes and defends, etc., when, etc., and says: That it does not owe the said sum of money above demanded, or any part [fol. 21] thereof, in manner and form as the plaintiff in its writ hath declared against it. And of this the defendants puts itself upon the country.

By Beane & Beane, Augusta, Me.; Harry O. Glasser and McKeever, Moore & Elam, Enid, Okla.; Bradley, Linnell & Jones, Portland, Me., Defendant's Attorneys.

And the Plaintiff likewise.

By Taylor, Blanc, Capron & Marsh, Verrill, Hale, Booth & Ives, Plaintiff's Attorneys.

And for a brief statement of special matter of defense to be used under the general issue pledged, the said defendant further says:

That of the averments of plaintiff's Declaration, this defendant admits that it is a Corporation duly created, organized and existing under the laws of the State of Maine, and having its principal office in the City of Augusta, in said State and District of Maine, and is a citizen and inhabitant of said State.

It also admits that it entered into the agreement in writing with the Plaintiff, a Corporation created, organized

and existing under the laws of the State of New York, which contract is marked Exhibit "A" and is annexed and made a part of plaintiff's Declaration and that under said contract a non-exclusive license under the United States Letters Patent is granted to the defendant by the plaintiff to construct and operate at its plant at Enid, Oklahoma, two Cross cracking units for cracking petroleum oils to produce motor gasoline; that said two Cross-cracking units have been constructed at said plant at Enid, Oklahoma, under the terms of the annexed contract, Exhibit "A", and [fol. 22] this defendant further admits that said contract contains a promise and an agreement that the defendant shall pay the plaintiff as royalty for the rights granted thereunder, a sum equal to ten cents (10c) per barrel of forty-two (42) gallons each, at sixty degrees Fahrenheit for each and every barrel of all oil passed through or treated in the units constructed and operated pursuant to said license, including "recycled" oil, and provides further that such royalties were to be payable at the office of the plaintiff in New York monthly, prior to the 10th of each month, for the operations of this defendant during the preceding calendar month.

This defendant says that up to and including the first day of February, 1928, the total number of barrels of all oil passed through or treated in said units, including said "recycled" oil, is 874,007.22.

And the defendant as and for an account in set-off states that it is entitled to a set-off to all of the amounts claimed and earned under that part of the contracts and agreements entered into by and between the plaintiff and defendant designated as Exhibit "A", and attached and made a part of plaintiff's declaration, by reason of the violation by plaintiff of a certain oral contract and obligation by it entered into with the defendant, as hereinafter set forth, and defendant is entitled to a judgment on its counter-claim for damages by reason of said violation, and now comes and files the following account in set-off, and prays that the same may be allowed.

Defendant admits that the contract attached to plaintiff's Declaration and marked Exhibit "A" contains the provision that "the making, execution and delivery of this agreement by the licensee have been induced by no repre-

sentations, statements, warranties or agreements other than those herein expressed. This agreement embodies the entire understanding of the parties and there are no further or other agreements or understanding, written or oral, in effect between the parties, relating to the subject [fol. 23] matter hereof, except the guarantee of operation contract of even date herewith"; but states affirmatively that said provision refers only to the matters and things contained in Exhibit "A" but does not make reference nor does the declaration herein make reference to certain other instruments in writing, contracts, agreements and proposals made, executed and entered into as a part of the transaction incident to which the contract marked Exhibit "A" was executed, all being interdependent one upon the other, to wit, a certain contract for the construction of the Cross Cracking Process plant by and between the defendant herein and the M. W. Kellogg Company, a contract guaranteeing the performance of the Cross Cracking Process by and between the defendant herein and the plaintiff herein, and an oral proposal made by plaintiff, through C. H. Welling, its Vice President, during the month of January, 1926, at Enid, Oklahoma, to the defendant, duly accepted by the defendant by its execution, through its President, H. H. Champlin, of the other written contracts hereinbefore described, said last named proposal being for the installation of a "Cross Vapor Phase System Treating Tower" for the purpose of deodorizing, clarifying and otherwise making merchantable the product produced by the Cross Cracking Process Plant, and which proposal was the inducement for the selection and purchase of the Cross Cracking System by the defendant and of the right to use the same under the contract marked Exhibit "A" to the declaration, and upon which proposal the defendant relied in executing all of the documents herein identified, copies of said original documents being hereto attached and marked Exhibits 1 and 2 respectively, for identification and by reference made a part hereof; that the contract between the defendant and the M. W. Kellogg Company for the construction of the Cross Cracking Process Plant was made and entered into by the parties thereto by procuration of the plaintiff herein, and its terms and conditions as appearing in said Exhibit 1 have been by the parties thereto

fully performed; that while the said plaintiff has per-
[fol. 24] formed the covenants and conditions of the license contract, being Exhibit "A" attached to its declaration, and is performing its obligations under the contract guaranteeing performance of such Cross Cracking Process Plant, being Exhibit 2 hereto attached, said plaintiff has wholly failed to carry out that part of its obligation which was the inducement for the execution of all other contracts herein enumerated and described, to wit, the obligation of its oral contract to furnish to the defendant a Cross Vapor Phase System Treating Tower, according to the terms and conditions and for the purposes of said proposal, whereby as an inducement to the defendant to enter into said contract with the plaintiff, Exhibit "A" attached to and made a part of the plaintiff's Declaration, said plaintiff undertook to procure for the defendant the installation of a Cross Vapor Phase System Treating Tower to be erected solely at the expense of the plaintiff and free from all payments of royalty, the said plaintiff to be reimbursed for the cost and expense of installation only, when the same was completed to the extent of functioning in a satisfactory and feasible manner, the terms and conditions of which said proposal were identical with those contained in a certain communication signed by Cross Engineering Company, by P. C. Keith, Jr., Vice President, directed to Champlin Refining Company, Enid, Oklahoma, dated February 6, 1926, and marked Exhibit 3 and attached hereto and made a part hereof, for the purposes of more fully describing the terms and conditions of said proposal herein referred to.

The defendant further states that, pursuant to said proposal, which proposal was by the defendant duly accepted by its execution of the contract Exhibit "A" to plaintiff's Declaration, the inducement to which said proposal was, and during the course of construction of the Cross cracking units at defendant's refinery at Enid, Oklahoma, the defendant made demand upon P. C. Keith, Jr., the then, and at all times the duly authorized agent of the plaintiff, [fol. 25] orally, at sundry times on each and every occasion of the visit of the said P. C. Keith, Jr., Agent of the plaintiff Company, to Enid, Oklahoma, and on each and every occasion of long distance telephone conversations be-

tween the said P. C. Keith, Jr., as such agent of plaintiff and the said H. H. Champlin from a time near the first day of June, 1926, to September 14, 1926, and upon the plaintiff itself by telegrams to plaintiff from defendant May 13, 1926, and July 12, 1926, for the erection and construction of the Cross Vapor Phase System Treating Tower, in conformity with said proposal; that in violation of the plaintiff's duty to this defendant, the plaintiff thereupon refused and neglected to install or cause to be installed a "Cross Vapor Phase System Treating Tower" and the plaintiff thereupon breached its contract, by failing to install said treating tower, so that this defendant might be enabled thereby to make merchantable the product taken from the Cross cracking plant.

That since September, 1926, the date of the installation of said Cross cracking plant units, up to and including the first day of February, 1928, the volume in barrels of charging stock put through the Cross Cracking Plant under the license thereon, including "recycled" oil, was a total of 874,007.22 barrels, distributed through the months as follows:

| | |
|---|---|
| September, 1926 | 37,001.44 |
| October, " | 66,385.98 |
| November, " | 96,989.74 |
| December, " | 105,439.50 |
| January, 1927 | 117,477.16 |
| February, " | 117,293.68 |
| March, " | 86,145.72 |
| October, " | 46,884.14 |
| November, " | 106,712.49 |
| December, " | 45,543.46 |
| January, 1928 | 48,133.91 |
| Total | 874,007.22 |

[fol. 26] The defendant further states, that by reason of the failure and neglect of the plaintiff to furnish this defendant a clarifying and deodorizing process, royalty free, this defendant has been damaged and asserts as a counter-claim in set-off against the plaintiff, in that this defendant, in anticipation of the installation of said Cross Cracking Plant and Cross Vapor Phase Treating Towers,

stored large quantities of gas oil from which this defendant accumulated and had on hand, produced by said Cross Cracking Plant, a large quantity of cracked gasoline accumulated in anticipation of and until said defendant was enabled to use the installation of a Treating plant to make said product marketable; said cracked gasoline, being then and there in its then state, untreated, an unmarketable product, said defendant was obliged to store, by reason of which said defendant was put to the expense of supplying quantities of lighter oils to replace the quantity lost by evaporation in storage, of supplying extra labor and fuel and insurance, and suffered the loss in quantity evaporated in storage, the loss of interest on the amounts of money it would have received as the price of the finished product if said Cross Vapor Phase Treating Towers had been installed; and the loss incident to shutting down its plant because of lack of the said Cross Vapor Phase Treating Towers and a loss of profits upon the sale of said cracked gasoline when manufactured into the finished marketable product, all to the damage of the defendant, as it says, the sum of Three Hundred Two Thousand Three Hundred Sixteen and 55/100 Dollars ($302,316.55).

And the defendant for a further account in set-off states that it is entitled to a set-off to all of the amounts claimed and earned under that part of the contracts and agreements entered into by and between the plaintiff and defendant designated as Exhibit "A" and attached to and made a part of the plaintiff's declaration by reason of the violation by plaintiff of its obligation entered into by a certain written proposal hereto attached and marked Ex-
[fol. 27] hibit "3" duly accepted as hereinafter set forth, and said defendant is entitled to a judgment on its counterclaim for damages by reason of said violation, and now the said defendant comes and files the following account in set-off as a second count hereto and prays that the same be allowed:

Defendant admits that the contract attached to plaintiff's declaration and marked Exhibit "A" contains the provsion that "the making, execution and delivery of this agreement by the licensee have been induced by no representations, statements, warranties or agreements other than those herein expressed. This agreement embodies the entire understandings of the parties and there are no

further or other agreements or understanding, written or oral, in effect between the parties, relating to the subject matter hereof, except the guarantee of operation contract of even date herewith"; but states affirmatively that said provision refers only to the matters and things contained in Exhibit "A" but does not make reference nor does the decelaration herein make reference to certain other instruments in writing, contracts, agreements and proposals made, executed and entered into as a part of the transaction incident to which the contract marked Exhibit "A" was executed, all being interdependent one upon the other, to wit, a certain contract for the construction of the Cross Cracking Process Plant by and between the defendant herein and the M. W. Kellogg Company, a contract guaranteeing the performance of the Cross Cracking Process by and between the defendant herein and the plaintiff herein, and a proposal given by the authority of and by direction of the plaintiff herein by Cross Engineering Company, executed in its behalf by P. C. Keith, Jr., the agent of the plaintiff, duly accepted by the defendant herein orally to P. C. Keith, Jr., Agent for said plaintiff by H. H. Champlin, President of the Defendant Company on the 6th day of February, 1926, and confirmed by the execution by the said H. H. Champlin, as President, of said Defendant Company of the contracts Exhibit [fol. 28] "A" attached to plaintiff's declaration and Exhibits 1 and 2 attached hereto and made a part hereof, said last named proposal being for the installation of a "Cross Vapor Phase System Treating Tower" for the purpose of deodorizing, clarifying and otherwise making merchantable the product produced by the Cross Cracking Process Plant, and which proposal was the inducement for the selection and purchase of the Cross Cracking System by the defendant and of the right to use the same under the contract marked Exhibit "A" to the declaration, and upon which proposal the defendant relied in executing all of the documents herein identified, copies of said original documents being hereto attached and marked Exhibits 1, 2 and 3 respectively, for identification and by reference made a part hereof; that the contract between the defendant and the M. W. Kellogg Company for the construction of the Cross Cracking Process Plant was made and entered into by the parties thereto by procura-

tion of the plaintiff herein, and its terms and conditions as appearing in said Exhibit 1 have been by the parties thereto fully performed; that while the said plaintiff has performed the covenants and conditions of the license contract, being Exhibit "A" attached to its declaration, and is performing its obligations under the contract guaranteeing performance of such Cross Cracking Process Plant, being Exhibit 2 hereto attached, said plaintiff has wholly failed to carry out that part of its obligation which was the inducement for the execution of all other contracts herein enumerated, and described, as evidenced by Exhibit 3 hereto attached, to wit, its obligation to furnish to the defendant by and through its agent aforesaid a Cross Vapor Phase System Treating Tower, according to the terms and conditions and for the purposes of said proposal.

As an inducement to the defendant to enter into said contract with the plaintiff, Exhibit "A" attached to and made a part of the plaintiff's Declaration, said plaintiff undertook to procure for the defendant the installation of [fol. 29] a Cross Vapor Phase System Treating Tower to be erected solely at the expense of the plaintiff and free from all payments of royalty, the said plaintiff to be reimbursed for the cost and expense of installation only, when the same was completed to the extent of functioning in a satisfactory and feasible manner, and said plaintiff in undertaking to perform its obligations directed its agent, P. C. Keith, Jr., to make a proposal to the defendant for the construction of said plant, and said proposal was made by said agent through Cross Engineering Company, all as appears by Exhibit 3 hereto attached and made a part hereof.

The defendant further states that, pursuant to the proposal, hereinbefore identified for reference as Exhibit 3, which proposal was by the defendant duly accepted, orally as aforesaid, and by its execution of the contract Exhibit "A" to plaintiff's Declaration, the inducement to which said proposal was, and during the course of construction of the Cross cracking units at defendant's refinery at Enid, Oklahoma, the defendant made demand upon P. C. Keith, Jr., the then, and at all times the duly authorized agent of the plaintiff, orally at sundry times on each and every occasion of the visit of the said P. C. Keith, Jr., Agent of the Plaintiff Company to Enid, Oklahoma, and on each and

every occasion of long-distance telephone conversations between the said P. C. Keith, Jr., as such agent of plaintiff and the said H. H. Champlin from a time near the first day of June, 1926, to September 14, 1926, and upon the plaintiff itself, by telegrams to plaintiff from defendant May 13, 1926, and July 12, 1926, for the erection and construction of the Cross Vapor Phase System Treating Tower, in conformity with said proposal; that in violation of the plaintiff's duty to this defendant, the plaintiff thereupon refused and neglected to install or cause to be installed a "Cross Vapor Phase System Treating Tower" and the plaintiff thereupon breached its contract, by failing to install said treating tower, so that this defendant might be enabled thereby to make merchantable the product taken from the Cross Cracking Plant.

[fol. 30] That since September, 1926, the date of the installation of said Cross cracking units, up to and including the first day of February, 1928, the volume in barrels of charging stock put through the Cross Cracking Plant under the license thereon, including "recycled" oil, was a total of 874,007.22 barrels, distributed through the months as follows:

| | | |
|---|---|---|
| September, | 1926 | 37,001.44 |
| October, | " | 66,385.98 |
| November, | " | 96,989.74 |
| December, | " | 105,439.50 |
| January, | 1927 | 117,477.16 |
| February, | " | 117,293.68 |
| March, | " | 86,145.72 |
| October, | " | 46,884.14 |
| November, | " | 106,712.49 |
| December, | " | 45,543.46 |
| January, | 1928 | 48,133.91 |
| Total | | 874,007.22 |

The defendant further states, that by reason of the failure and neglect of the plaintiff to carry into effect its obligation to furnish this defendant a clarifying and deodorizing process, royalty free, this defendant has been damaged, and asserts as a counter-claim in set-off against the plaintiff, in that this defendant in anticipation of the installation

of said Cross Cracking Plant and Cross Vapor Phase Treating Towers, stored large quantities of gas oil from which this defendant accumulated and had on hand, produced by said Cross Cracking plant a large quantity of cracked gasoline, accumulated in anticipation of and until said defendant was enabled to use the installation of a treating plant to make said product marketable; said cracked gasoline, being then and there in its then state, untreated, an unmarketable product, said defendant was obliged to store, by reason of which said defendant was put to the expense of supplying quantities of lighter oils to replace the [fol. 31] quantity lost by evaporation in storage, of supplying extra labor and fuel and insurance and suffered the loss in quantity evaporated in storage, the loss of interest on the amounts of money it would have received as the price of the finished product if said Cross Vapor Phase Treating Towers had been installed and the loss incident to shutting down its plant because of lack of the said Cross Vapor Phase Treating Towers and a loss of profits upon the sale of said cracked gasoline when manufactured into the finished marketable product, all to the damage of the defendant, as it says, the sum of Three Hundred and Two Thousand Three Hundred Sixteen Dollars and Fifty-five Cents ($302,316.55).

Champlin Refining Company, by Its Attorneys, Beane & Beane, Harry O. Glasser, McKeever, Moore & Elam, Bradley, Linnell & Jones.

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EXHIBIT NO. "1" ANNEXED TO PLEADINGS

This Contract made this 26 day of February, 1926, by and between Champlin Refining Company of Enid, Oklahoma, a corporation organized under the laws of the State of Maine, hereinafter referred to as "Purchaser" and The M. W. Kellogg Company, of 90 West Street, New York City, a corporation organized under the laws of the State of Delaware, hereinafter referred to as "Contractor."

Witnesseth:

The purchaser is desirous of contracting and installing and of completing the construction, erection and equipment of one double two thousand barrell unit Cross cracking

plant (4,000 barrels nominal charging capacity per 24 hours) equipped with bubble type of dephlegmating towers, [fol. 32] all in accordance with drawings, designs, specifications and bill of material furnished by Gasoline Products Company, Inc., known as Series 12, said plant to be erected on a site to be furnished by Purchaser at Purchaser's refinery in or near Enid, Oklahoma.

For the consideration hereinafter stated and in consideration of the premises and of the mutual covenants and agreements of the parties herein contained, the parties hereto have agreed and do hereby agree as follows:

1. Work to be Done Under This Contract.—Contractor will furnish and provide all the necessary materials, and perform or cause to be performed all the necessary work for the complete construction, ready to operate, except for necessary tankage, connecting steam, oil, water, and electric lines, etc., (with the exception of certain work noted below in Paragraph 8 under the heading of "Purchaser hereby agrees at its own expense to") of a Cross Cracking Plant consisting of One Double Two Thousand Barrel unit equipped with bubble type dephlegmating towers (made up of two units connected to one common control house, each unit having a nominal charging capacity of 2,000 barrels per 24 hours). These units are known as Series 12.

2. Contract Price.—The Purchaser, in consideration of the materials furnished and labor performed by the Contractor, as outlined herein, will pay to the Contractor at its New York Office, in the manner hereinafter designated, the sum of Four Hundred Thirteen Thousand Dollars (413,000.00) in lawful currency of the United States.

3. Terms of Payment.—Within thirty (30) days after the Contractor begins the work herein provided for, the Purchaser agrees to pay Forty Thousand ($40,000.00) Dollars, and to pay the further sum of Forty Thousand ($40,000.00) Dollars within each thirty (30) days thereafter until the sum of One Hundred Sixty Thousand ($160,000.00) Dollars is paid. An additional Forty Thousand ($40,000) is [fol. 33] to be paid upon completion of the plant. If the Contractor should complete the work in less time than four (4) months so that One Hundred Sixty Thousand ($160,000.00) Dollars should not have been paid at the

completion of the plant, the Purchaser will pay upon the completion of the plant, such an amount that with the amounts already paid will make Two Hundred Thousand ($200,000.00) Dollars. Upon completion of the plant and acceptance thereof by the Purchaser, the Purchaser is also to deliver its notes to the Contractor aggregating Two Hundred Thirteen Thousand ($213,000.00) Dollars as follows:

Ten (10) notes of Twenty Thousand ($20,000.00) Dollars, and One (1) note of Thirteen Thousand ($13,000.00) Dollars, the first of said notes to mature Thirty (30) days from date and the balance, one every Thirty (30) days thereafter until all are paid; said notes to bear Six (6%) percent interest from date.

4. Completion and Acceptance of Work.—The Contractor will test in the presence of Purchaser or its representatives, immediately upon completion of the work provided for hereunder, all parts of the plant which require pressure testing, at a pressure for each part which is double the normal working pressure for that part, the high pressure parts to be tested at 1500 pounds pressure. The Purchaser will, immediately upon completion of Contractor's work hereunder, make a complete inspection of same. If such inspection discloses any defects the Purchaser will immediately notify the Contractor in writing thereof and upon correction of such defects will again inspect the work, and so on, until the work is in accordance with the provisions of this agreement.

Upon completion of the work as aforesaid, the Purchaser will forthwith accept the work by a letter directed and delivered to the Contractor.

5. Design of Plant.—The work to be done by Contractor under this contract is to be in accordance with drawings, [fol. 34] designs and specifications furnished by Gasoline Products Company, Inc.

6. Location of Plant.—The work to be done under this contract is to be at the refinery of the Purchaser in or near Enid, Oklahoma.

7. Time of Completion of Work.—The Contractor will start work promptly upon the execution of this contract and carry same to a conclusion with all diligence and within

a reasonable time. It is estimated that the work to be done will require about 5 months' time.

8. Purchaser hereby agrees at its own expense to:

(a) Procure all neccessary permits and licenses required in connection with this plant.

(b) Furnish railroad siding at a point not to exceed 100' distant from the site of the cracking plant, and allow Contractor to unload all materials therefrom.

(c) Furnish clear and ample space for unloading of material and reasonable clear and level ground for moving the material from the siding to the cracking plant site.

(d) Furnish all materials and do all work required outside the cracking plant proper, and connect to pipe lines, electric lines, etc., built by Contractor.

(e) Supply for construction purposes at cracking plant site, necessary water, steam, electricity, and compressed air (at 100 lbs. pressure) in sufficient quantities as may be required for the successful and continuous prosecution of the work.

(f) Do all necessary grading before and after construction of plant, and construct a finished grading around apparatus if this is desired.

(g) Remove all existing pipe lines and/or other obstructions which may be under ground or over ground so that such pipe lines and/or obstructions will in no way interfere [fol. 35] with the construction of the plant.

(h) Furnish and install all foam and high pressure water lines and apparatus for fire protection, if desired by Purchaser.

(i) Furnish Contractor with proper bench marks for elevations as may be required, and provide proper and accurate lines for locating the plant.

9. Foundations.—The work of the Contractor on foundations is limited to the size and depth of foundations called for on the Gasoline Products Company, Inc., drawings Series 12. The foundations have been designed for ground with a bearing capacity of not less than two (2) tons per square foot.

The work of the Contractor in respect to excavation is limited to what is classed as ordinary excavation. In the event that the ground is such that the foundations for said plant, due to the nature of the soil, require special construction or rock excavation, the Contractor will do such special construction and/or rock excavation, as may be required, at cost plus fifteen per cent (15%), such extra cost to be based on any extra material or labor or designing required.

10. Inspection by Purchaser.—All material and construction work during process of manufacture, or during erection at plant site, is to be subject at all times to inspection by the Purchaser or its authorized representative.

11. Instructors.—The Contractor will furnish two (2) men at its own expense to instruct Purchaser in the proper operation of this plant for a period of forty-five (45) consecutive days, starting at the time when the plant shall be first put into operation. If the services of these men are required beyond forty-five (45) days, a charge of Fifteen Dollars ($15.00) per day per man, plus board and living expenses, shall be paid by Purchaser to Contractor.

While such instructors are engaged in instructing Purchaser or its employees in the Operation of the plant, they [fol. 36] shall in all respects be under the direction and control of, and subject to removal by, the Purchaser, which assumes, and will idemnify and hold Contractor harmless from any and all responsibility for accident or injury to property or persons resulting from their acts while so engaged.

12. This contract shall be binding upon and shall inure to the benefit of the legal successors of the parties hereto, in accordance with the true intent and meaning hereof.

In witness whereof the parties hereto have caused these presents to be executed in three counterparts, each of which shall be deemed an original, by their officers thereunto duly authorized, and have caused their corporate seals to be hereunto affixed and duly attested by their secretaries as of the day, and year first above written.

Champlin Refining Company. H. H. Champlin, President. Attest: D. W. Cotton, Secretary. The M. W. Kellogg Company. L. H. Harvison, Vice-President. —— ——, Asst. Secretary.

EXHIBIT No. "2" ANNEXED TO PLEADING

This agrement, made and entered into this 26 day of February, 1926, by and between Gasoline Products Company, Inc., a corporation organized under the laws of the State of New York (hereinafter referred to as the "Licensor"), and Champlin Refining Company, a corporation organized under the laws of the State of Maine, (hereinafter referred to as the "Licensee").

[fol. 37] Witnesseth:

Whereas, the Licensor and the Licensee have entered into a certain license agrement bearing even date herewith, whereby the Licensor has granted to the Licensee certain rights under patents described in said document, and

Whereas, the Licensee desires to construct a plant for the cracking of oil pursuant to the patent rights so granted, and has requested the Licensor to give the guarantee hereinafter mentioned; and

Whereas, the Licensor, in order to secure the benefits arising under the aforesaid license agreement from the construction and operation of said plant, is willing to give the guarantee aforesaid,

Now, Therefore, in consideration of the premises and of the covenants and agreements hereinafter contained, the parties hereto do hereby covenant and agree as follows:

First. The Licensee agrees to commence, or cause to be commenced, within six (6) months from the date of this agreement, and expeditiously complete at its own cost the construction and installation of two units ("Series 12" having a rated daily throughput capacity each of two thousand (2000) barrels per twenty-four (24) hours) for the cracking of oil by the Cross Process (as defined in said License Agreement), at the plant of the Licensee located at Enid, Oklahoma, such units to be constructed and installed in accordance with drawings, designs and specifications prepared and furnished or approved in writing by the Licensor, and said units to be subject to inspection, test, and approval, upon completion, by engineers designated by the Licensor (hereinafter referred to as the "Engineers").

Second. The Licensor agrees that within the period of sixty (60) days from the date of completion of the installa-

tion and construction of said units upon written notification by the Engineers that said units are completed and ready for commercial operation, the Licensor will supervise a test [fol. 38] period of each of the said units under the the following conditions:

The duration of the test period shall be thirty (30) days. During this period each unit while on stream shall process not less than two thousand (2000) barrels per day and shall produce therefrom not less than six hundred and fifty (650) barrels per day of gasoline. The character of gasoline made upon such test operation shall be determined in accordance with the standard method 100.12 of the United States Department of the Interior, as published in the year 1924 and described on pages five hundred seventy-five (575) to five hundred seventy-eight inclusive of Bulletin Number Seventeen (17) of the Kansas City Testing Laboratory.

In conducting said test run or test runs, all recoverable oil suitable for recycling shall be recycled and credited as charging stock.

Wherever used in this agreement the term "barrel" means a barrel of forty-two (42) United States Gallons at Sixty degrees (60°) F.

Samples for the determination of the character of the product of the unit shall be taken at such intervals as may be mutually agreed upon and in such manner as to truly represent the character of the product.

Said test run or test runs shall be conducted by the Licensee under instructions from and supervision of the Licensor or its representative, designated in writing to supervise the same (who may be the Engineers or an officer or employee of the Licensor or of The M. W. Kellogg Company). The Licensee shall furnish all materials and labor required for said test run or test runs and called for by the Licensor or its said representative. The Licensor, or its said representative, shall have (1) free access at all times during said test run, or test runs, to said unit, (2) full opportunity to inspect all materials to be employed in connection with said test run or test runs, and (3) the privilege at the time of such inspection of rejecting any of the material mentioned in the third paragraph of this Guarantee [fol. 39] which is not in accordance with the specifications therein prescribed and any of the other materials required which are not in accordance with specifications theretofore

submitted by the Licensor, or its said representative, to the Licensee.

Third.—The Licensor guarantees the Licensee that each said unit upon a test run, conducted within the period and under the conditions aforesaid, will, while on stream—

(1) Make from Mid-Continent or similar paraffin base gas oil or kerosene having the following properties:

Gravity not heavier than thirty-two degrees (32°) Baume;
Initial boiling point, not less than three hundred fifty degrees (350°) F.;
End of dry point distillation, not over seven hundred sixty degrees (760°) F.;
Containing not more than one-half of one per cent (050%) of sulphur;
Free from residual oil;
Straw or amber color;

Not less than sixty-five per cent (65%) by volume with recycling, or not less than thirty-two and one-half per cent (32.5%) by volume without recycling, of gasoline having the following properties:

Initial boiling point, not more than one hundred thirty-five degrees (135°) F.;
End of dry point distillation, not more than four hundred thirty-seven (437°) degrees F.;
Ninety-five per cent (95%) of liquid products distilled to be recovered.

(2) Make from gas oil or kerosene having the properties hereinbefore specified, gasoline having the properties hereinbefore specified, to an amount equal to at least six hundred fifty (650) barrels for each twenty-four (24) hours of said test run.

[fol. 40] The Licensor further guarantees the Licensee that upon a test run of one hundred and forty-four (144) hours' duration, conducted within the period and under the conditions aforesaid:

(a) The unit will run at least twelve thousand (12000) barrels of charging stock;

(b) the actual fuel consumption will not exceed two per cent (2%) in liquid volume of the amount of charging stock treated, in addition to the incondensable gases gen-

erated in the operation of the unit under test and available for fuel;

(c) the unit under test will, with one hundred per cent (100%) recycling, from not more than one thousand (1000) barrels of gas oil or kerosene having the properties hereinabove described, or from not more than two thousand (2000) barrels of such gas oil or kerosene fresh charging stock without recycling, make an average of not less than six hundred fifty (650) barrels of gasoline having the properties above described; and that the total recoverable quantity per cycle of liquid products will not be less than ninety-five per cent (95%) of the throughput per cycle: and

(d) the fuel obtained as residu-m during the test run and under the conditions herein stated will be of commercial character and contain not more than one per cent (1%) by volume of carbon sediment.

Fourth.—The Licensor shall incur no liability hereunder unless and until said units shall have been completed and installed and it shall have received the written notification as provided in Paragraph Second hereof that the same are ready for commercial operation. Nor shall the Licensor incur any liability hereunder if it shall be prevented from supervising the said test run or test runs within the prescribed sixty (60) days' period by reason of failure of the Licensee or its employees to comply with the requirements of Paragraphs Second and Third hereof; provided, however, that if by reason of strikes, lockouts or other forces beyond [fol. 41] the control of the Licensor or of the Licensee, or of hidden defects in said units the Licensee shall be unable to conduct and complete such test run or tests runs in accordance with the provisions of this agreement, the Licensee shall have a further period of sixty (60) days after the cause of such delay shall have been removed (but in no event later than six (6) months after receipt by Licensor of the written notification above mentioned) for the purpose of conducting such test run or test runs in accordance with the provisions of this agreement. The Licensor shall incur no liability hereunder if, prior to completion of the said test run or test runs, the Licensee shall fail to perform

any of the covenants by it to be performed under said Licensee agreement.

Deleted.
C. H. Welling.
H. H. C.

Fifth. The Licensor further guarantees the Licensee that should the royalty rate applying to any other of the Licensors' Licensees be changed from the schedule under which the Licensee of this contract operates, then the said Licensee shall be given the advantage of such changes by the said Licensor.

Sixth. In case said units shall be completed as provided in paragraph first hereof, and shall fail to make available the quantity and quality of gasoline, or to produce the other operating results, specifically guaranteed in paragraph third, hereof, upon a test run conducted in accordance with the provisions of paragraph second, third and fourth hereof, by reason whereof there shall be a breach of such guarantee, then and in that event the Licensor shall pay to the Licensee and the Licensee shall accept as liquidated damages for such breach, an amount equal to the cost to the Licensee of the construction and installation of said units such cost to be the amount paid by the Licensee to the M. W. Kellogg Co. for the construction and installation of said units. Such liquidated damages have been fixed and agreed upon by the parties hereto because of the difficulty of determining the actual damages, and it is expressly [fol. 42] agreed that said liquidated damages shall be paid and received in full settlement of all liability and obligation of the Licensor hereunder. Upon such payment being made, any and all obligation and liability of the Licensor hereunder shall forthwith terminate, and the Licensor shall be entitled to and must at the option of the Licensee at its own cost and expense and within ninety (90) days of completion of the test remove said units and dispose thereof as/to it may seem best for its own account. The Licensee shall furnish the Licensor full and free access and opportunity necessary to effectuate such removal.

In witness whereof, the parties hereto have caused these presents to be executed by their officers thereunto duly authorized, and have caused their respective corporate seals

to be hereto affixed, attested by their Secretaries, the day and year first above written.

Gasoline Products Company, Inc., by C. H. Welling, Vice-President. Attest: M. A. Hood, Secretary. (Seal.) Champlin Refining Company, by H. H. Champlin, President. (Seal.) Attest: D. W. Cotton, Secretary.

Approved as to form: J. B. Marsh.

[fol. 43] STATE OF NEW YORK,
County of New York, ss:

On this 26th day of February, 1926, before me personally came C. H. Welling, to me known, who, being by me duly sworn, did depose and say: That he resides at New York City, that he is the Vice-President of Gasoline Products Company, Inc., the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal, that it was so affixed by order of the Board of Directors of said Corporation and that he signed his name thereto by like order.

Guilietta Talamini, Notary Public. New York County Clerk's No. 190. New York Register's No. 6138. Term expires March 30, 1926. (Seal.)

STATE OF OKLAHOMA,
County of Garfield, ss:

On this 26th day of February, 1926, before me personally came H. H. Champlin, to me known, who, being by me duly sworn did depose and say: That he resides at Enid, Oklahoma, that he is the President of Champlin Refining Company, the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

Daisy Fergeson, Notary Public. My com. expires July 1st, 1929. (Seal.)

[fol. 44] EXHIBIT No. 3 ANNEXED TO PLEADING

Enid, Oklahoma, February 6, 1926.

Champlin Refining Company, Enid, Oklahoma.

Attention Mr. H. H. Champlin

DEAR SIR: Directed by Mr. C. H. Welling, Vice-President of the Gasoline Products Company, Inc., we are pleased to outline in this letter their proposition covering the installation of a Cross Vapor Phase System treating tower.

The installation is to be made solely at the expense of the Gasoline Products Company, and no monies are to be paid by the Champlin Refining Company to the Gasoline Products Company until the installation is operating in a satisfactory and feasible manner. The unit shall be said to be satisfactory when the gasoline produced from it has a color, when measured by a standard Saybolt Color Machine as ordinarily used in the refining industry, of twenty-five (25) or better; is sweet to the "doctor" test as ordinarily understood; passes the copper strip corrosion test; and after eight hours continuous exposure to the sun still has a color of twenty-one or better.

When the installation is functioning in a satisfactory manner the Champlin Refining Company is to reimburse the Gasoline Products Company, for the cost only of the installation.

We are directed to state that the Gasoline Products Company will, in the event that any suits are instituted against the Champlin Refining Company for infringement of patents, undertake and assume the defense thereof, the liability of the Gasoline Products Company, however, being limited to the payment of the court costs as taxed and the compensation and expenses of counsel and experts of its own selection. The Champlin Refining Company shall cooperate fully in the defense of such suits and to that end [fol. 45] shall furnish all the evidence in its control. The Champlin Refining Company shall also give the Gasoline Products Company immediate notice of the making of any written claims of infringement.

We are further directed to state that such an installation is to be royalty free as are any other installations which

may be made at the Enid, Oklahoma, refinery of the Champlin Refining Company when said installations are used directly in treating of gasoline produced from the Cross process.

Cross Engineering Company, by (P. C. Keith, Jr.,) Vice-President.

PCK/PS.

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IN UNITED STATES DISTRICT COURT

PLAINTIFF'S PLEA TO DEFENDANT'S DECLARATION IN SET-OFF —Filed April 19, 1928.

Now comes the plaintiff in the above entitled cause and defends and says that it never promised the defendant in manner and form as the defendant has declared against it in its account in set-off.

And the plaintiff with respect to said account in set-off also pleads the statute of frauds of the State of Maine, being Section 1 of Chapter 114 of the Revised Statutes of Maine, and Section 4 of Chapter 191 of the Public Laws of 1923.

By Its Attorneys, Taylor, Blanc, Capron & Marsh, Verrill, Hale, Booth & Ives.

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IN UNITED STATES DISTRICT COURT

STIPULATION RE FACTS—Filed April 23, 1929

In the above entitled cause, it is hereby stipulated and agreed:

1. That the amount earned by the plaintiff for royalties under and pursuant to the so-called license agreement between the defendant and the plaintiff annexed to the plaintiff's declaration as Exhibit "A", and made a part thereof, amounted on February 28, 1927, to $54,058.75; and the interest computed on said royalties from the 10th day of each [fol. 46] month for the royalties accrued during the month previous,—said interest computed to and including the 30th day of April, 1929,—amounts to $7,471.81.

2. As to letters and telegrams otherwise admissible in evidence no objections will be made on the part of either party merely on the ground that the same are not originals or are not identified by oral testimony of the party sending the same. Both parties reserve the right, however, to compare alleged copies of letters and telegrams with the originals of said letters or with the office copies of such letters and telegrams where available. And copies not appearing to conform with the originals or with office copies shall be corrected so as to be brought into conformity therewith.

3. Subject to the right of either party to object to admissibility thereof on the ground that they are immaterial, impertinent and/or irrelevant, and subject to the further right of either party to introduce in evidence such other exhibits as may be admissible, either party may introduce in evidence all exhibits introduced by either party at the previous trial of this cause, appearing as plaintiff's exhibits Nos. 1 to 3-D inclusive, and as defendant's exhibits Nos. A and A-1 to A-46 inclusive, as printed on pages 239 to 286 inclusive of the printed transcript of record on appeal, filed in the United States Circuit Court of Appeals for the First Circuit.

Dated April 22nd, 1929.

Verrill, Hale, Booth & Ives, Taylor, Blanc, Capron & Marsh, John B. Marsh, Attorneys for Plaintiff.
McKeever Elam & Stewart, Horace G. McKeever, Bradley, Linnell & Jones, W. G. Linnell and Carl Jones, Emory O. Beane, Harry O. Glasser, Attorneys for Defendant.

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[fol. 47] IN UNITED STATES DISTRICT COURT

MINUTE ENTRY

On the 23rd day of April, 1929, issue having been joined, a jury was duly empaneled to try the issue and the cause proceeded to trial.

IN UNITED STATES DISTRICT COURT

**Statement of Evidence**

Tuesday Afternoon, April 23rd, 1929—2:05 o'clock.

(Five witnesses sworn by the Clerk.)

H. H. CHAMPLIN, called, testified:

Direct examination.

By Mr. McKeever:

Q. Will you state your name to the jury?

Mr. Hale: Just a minute, Mr. Champlin. Before the testimony progresses, we would like our objection noted and our right saved on the admission of any testimony whatever in support of the account in set off, which we conceive to be not properly pleaded under the Maine statute and as not being for a sum liquidated or ascertainable by calculation. We do not conceive that the Circuit Court precludes us on that point.

The Court: Well, I thought it did. I only just casually looked at it.

Mr. McKeever: We contend that the opinion of the Circuit Court of Appeals adjudicates that question.

The Court: Your rights are preserved.

Mr. Hale: We simply want our rights preserved.

Q. State your name to the jury?
A. H. H. Champlin.
Q. Where do you live?
A. Enid, Oklahoma.
Q. In what business are you engaged?
A. On the oil producing and refining business, and marketing.
Q. With what company are you connected?
A. With Champlin Refining Company.
Q. Is that a corporation?
A. Yes.
[fol. 48] Q. Where is it incorporated.
A. The State of Maine.
Q. Where is its principal place of business?
A. Enid, Oklahoma.

Q. What kind of a business has it at Enid?

A. A refinery.

Q. When was that refinery established? Just the year?

A. 1917.

Q. When was your company incorporated?

A. In 1920.

Q. Since the incorporation of the company what position have you held in connection with it?

A. President.

Q. Are you still such officer?

A. Yes, sir.

Q. Have you been all the time?

A. Yes, sir.

Q. Are you the managing officer also?

A. Yes.

Q. And have been at all times since the incorporation?

A. Yes.

Q. At the time this refinery belonging to the Champlin Refining Company was constructed, what kind of a plant was it?

A. It was a small skimming plant when I first purchased it in 1917.

Q. Now what is a skimming plant?

A. A skimming plant is a refinery that just takes off the lighter oils and hasn't any cracking process in connection with it.

Q. That is done by heat process, is it not?

A. The distillation of the oil.

Q. Now was your plant changed from a skimming plant to some other kind of a plant or anything added to it? If so, when and what?

A. In the fall of 1926 we started to operate Cross cracking plant in connection with our old refinery.

Q. Will you now state to the jury in a short way what a cracking plant is?

A. A cracking plant—the Cross cracking plant was designed to process or crack gas oil.

The Court: The jury probably does not understand what you mean by "cracking." You had better explain that.

A. Well, cracking is subjecting gas oil to high heat and high temperature.

[fol. 49] By the Court:

Q. Pressure you mean?
A. Pressure, yes.

By same:

Q. Pressure and temperature?
A. Yes, sir; and it produces gasoline from the gas oil.
Q. Now the product used to supply a cracking unit, where do you get that?
A. It is a produce taken from crude oil obtained from our skimming plant.
Q. Now you yourself operate a skimming plant?
A. Yes.
Q. And also the cracking plant?
A. Yes.
Q. And the skimming plant takes off the first gasoline and the residue of that is run through the cracking plant?
A. Yes.
Q. And that gets the second gasoline?
A. Yes.
Q. The process being to subject it to high heat pressure and release the gasoline from the molecules, or crack it up and get the gasoline?
A. Yes.
Q. Which cannot be done by the skimming plant?
A. No.
Q. Now then after it is cracked, what kind of a product do you obtain from the cracking process?
A. It is a product that was always termed by the Cross cracking plant people a synthetic crude. It is an unfinished gasoline.
Q. More properly called——
A. It has to be further treated to make it a merchantable product.
Q. What is the matter with it?
A. Well, it has a bad odor, a bad color, and has sulphur.
Q. What effect does that have on its marketability?
A. It isn't marketable in that—gasoline in that state.
Q. Now what can be done with it to make it marketable?
A. We can treat it.
Q. How?

A. Well, there are several ways of treating. We can treat it by re-running it in a shell still, and then giving it a treatment of litharge or chlorine, and make it merchantable in that manner, but there is also another method of running it through towers that are charged with Fuller's earth.

Q. Now what are those called? What are they referred to in the trade and in this litigation of ours? What I mean. [fol. 50] Well, I will ask you——

A. We have a process in use now that we call it the German vapor phase treating process.

Q. They are referred to as the vapor phase system?

A. Yes. The vapor goes through the clay before it is condensed, and it purifies it and otherwise makes it merchantable. That is, it is merchantable after it has the chlorine treatment.

Q. But also merchantable after it has the vapor phase treatment? Oh, no. I am misleading you. After it passes through the vapor phase towers does it have to have further treatment?

A. We give it the chlorine treatment to make it sweet to the doctor.

Q. What do you mean by that?

A. That is to remove the sulphur content.

Q. Then it becomes marketable?

A. Yes.

Q. Now, have you such a plant that it is equipped with this vapor phase system?

A. Yes.

Q. Do you further treat it by the chlorine solution treatment?

A. Yes.

Q. When did you first meet any representative of the plaintiff company, the Gasoline Products Company, approximately?

Mr. Hale: Just a minute, if your Honor please. I do not want to have this witness pass in advance on the question of agency or representation.

The Court: Can't you name any person he met, and let it go at that?

Mr. McKeever: Yes, sir.

Q. When did you meet Mr. Guy Harcourt?

A. During the year 1924-25.

Q. Where did you meet him?
A. At my office in Enid, Oklahoma.

Mr. McKeever: Now, if the Court please, I suppose we better number these exhibits anew?
The Court: Oh, yes, I think so.

(Document marked Defendant's Exhibit No. 1.)

[fol. 51]. Q. I now hand you, Mr. Champlin, Defendant's Exhibit No. 1, and ask you if that is part of the files of your office?
A. Yes.

The Court: If you are going to put in a lot of letters, can't we arrange to obviate the preliminary questions? If there is no objection, find out beforehand if there is not, and go right along.
Mr. McKeever: As I understand, there will be no objection to the ones we offered before. That being true and so indicated by Mr. Hale, we offer in evidence Defendant's Exhibit No. 1.
The Court: That is admitted. Read it and, if you want to ask him anything about it, do so afterwards.

Mr. McKeever then read from Defendant's Exhibit No. 1 as follows:

"The M. W. Kellogg Co., Jersey City, N. J.

March 20, 1925.

Mr. P. E. Slater, Champlin Refining Co., Enid, Okla.

My Dear Slater: I am enclosing herewith typed information which I showed you in manuscript from last Monday. I am also having the Laboratory send to you samples of materials obtained by cracking from the stocks which you forwarded to us. I have already given you the Kansas City Testing Laboratory reports on these materials, and by referring to the Laboratory number and to the number marked on the sample, you will be able to see what kind of material was obtained from each test.
I am still awaiting information from New York on the question of the towers which we discussed Monday after-

noon. I will keep after them and try to get it to you as soon as possible.

Very truly yours, The M. W. Kellogg Company, by Guy N. Harcourt.

[fol. 52] The Court: What was the date of that?

Mr. McKeever: March 20, 1925. Attached to that are the financial returns to be expected by the Champlin Refining Company from cracking by the Cross Process based on the installation of four one-thousand barrel units, plus a pipe still for fuel oil.

The Court: It is not necessary to read all that?

Mr. McKeever: No, sir. The rest of the exhibit is as indicated by what I have read, and I do not desire to read that at this time, but the whole exhibit is offered in evidence.

Mr. Hale: You might read that part about the prices, Mr. McKeever.

Mr. McKeever: With the permission of Mr. Hale, I want to refer to that later by another witness; I am not leaving it out, but at this I do not desire to refer to the pieces.

By Mr. McKeever:

Q. Now, Mr. Champlin, did Mr. Harcourt call on you at any time subsequent to this date of March 20, 1925?

A. Yes.

Q. Did you have any conversation with him with reference to any business?

A. Often, yes.

Q. What was the conversation in substance?

A. Well, he was in Enid to sell me a Cross Cracking Plant, and he came on a number of occasions to urge the sale of his plant—was there often during the summer of 1925 and even prior to that year.

Q. Now during that summer of 1925 and along about the visits of Harcourt and later, were there other companies besides those representing the Cross that had representatives call on you?

A. Yes.

Q. How many?

A. Four or five.

Q. Who were they?

A. The Universal Company of Chicago, selling the Dubbs Process; someone selling the Fleming Process; someone selling the Jenkins Process; someone selling the Holmes-Manley process.

[fol. 53] Q. Now did Mr. Harcourt call on you at any time after the ending of 1925?

A. No.

Q. Do you know P. C. Keith, Jr.?

A. Yes.

Q. When did you first meet him?

A. The fall of 1925.

Q. Was that about the time Harcourt ceased to call on you?

A. Yes.

Q. What conversation did you have with Mr. Keith, and what was the occasion of his visit, the first time?

Mr. Hale: Just a minute, Mr. Champlin. Again, at this point, if your Honor please, we feel that we are in this position: If this testimony is offered solely with respect to the first count of the defendant's account in set-off, which alleges an oral contract, we do not object to it. If it is offered under the second count, which alleges a written contract, then we regard it as testimony tending to show negotiations which led up to a written contract. We, therefore, feel that the defendant should specify on what count this is being offered.

The Court: It is pretty difficult to distinguish.

Mr. Hale: It is, if your Honor please, and frankly we feel that under the opinion of the Circuit Court of Appeals the second count in their declaration in set-off is really no longer open to them.

The Court: I hadn't noticed the possibility of that viewpoint.

Mr. Hale: On Page 6 of the Opinion, the Court says, referring to the letter of February 6th, that "no question here arises under the guarantee contract that it is relevant only as it bears on the relation of the various concerns involved in this negotiation and the resultant transaction; that the letter copied above is"—that refers to the letter of February 6th—"on its face but a memorandum of the terms of the oral offer made in January by Welling and Keith for the installation of the Cross treating tower, but

the gist of the present case is whether this oral offer was made by plaintiff's agent and was accepted by the defendant."

[fol. 54] As we understand the opinion of the Court, it is based entirely on that oral offer.

The Court: Do you understand it results in the proving of the alleged written contract in the case? I think the best way perhaps would be to go ahead and hear the testimony and try to allocate it later, if it is admissible and pertinent possibly on the other question.

Mr. McKeever: Yes, your Honor. Of course, we disagree with Mr. Hale on that. The second count here is pleaded in a way that I think it comes clearly within the opinion of the Court That is a matter I do not care to discuss if the Court will permit me to proceed and then cover it by such instructions as it requires.

The Court: I think you better proceed with this witness.

Mr. Hale: I should like also to call the Court's attention to the language on Page 12 of the Opinion, "But this paper," referring again to the letter of February 6th, "is not a proposal from the Cross Engineering Company. It is an outline of a proposition already made by the Gasoline Products Company." So it seems to us that the Court clearly has treated the latter as a memorandum of evidence merely and not as being in itself a proposition. But lest there be any misapprehension, we should like to have our rights protected.

The Court: I think your rights are adequately protected by my suggestion that the witness be heard and that we decide the point you refer to as to which count this refers to later, and your rights will be taken care of.

By Mr. McKeever:

Q. That was in the latter part of 1925 I am referring to?

A. He followed Mr. Harcourt as sales agent for the Cross Cracking process, and he was in my office in December trying to interest me in buying their process.

Q. Now, did he appear there again the following month?

A. He appeared in January several times.

[fol. 55] Q. The first time in January was he accompanied by anybody else?

A. No.

Q. What was the occasion of his appearance there the first time?

A. He came to sell me a Cross cracking plant.

Q. Did you discuss with him the question of your purchase of it?

Mr. Hale: Just a minute! Why don't you ask him what he said?

By Mr. Keever:

Q. In substance what was your conversation that time? What was it about?

A. In December?

Q. No; the first time he was there in January?

A. Well, in January he came to offer me in addition to the Cross cracking plant a new invention of Dr. Cross which he termed the Cross Vapor Phase Treating process.

Q. Now, you say he came to offer you that? What did he say in that connection?

A. He said that Dr. Cross had lately invented a new process and that his company were anxious to install an initial installation and that he was authorized to give us that process royalty free in the event we would buy a Cross cracking plant.

Q. You refer to his company. Did he say whose his company was?

A. The Gasoline Products Company.

Mr. Hale: Just a minute! That we object to.

The Court: He said he offered it in behalf of the Gasoline Products Company. I think it is admissible.

By Mr. McKeever:

Q. When did he next appear?

A. I think he came two or three times during that month. He was very anxious to sell us this process.

Q. Now, did he appear during that month with anybody else?

A. January 27th he appeared with C. H. Welling, Vice President of The Gasoline Products Company.

Q. Is that the same Mr. Welling that is in the room here to-day?

A. I think it is. I never met him but once; on that one occasion; and I have recognized him to-day.

[fol. 56] Q. Where did you meet Mr. Welling?

A. In my office.

Q. Did he come in company with Mr. Keith?

A. Yes.

Q. What conversation did you have with Mr. Welling and Mr. Keith together? I do not mean now to separate each; but where one was present and the other was present; when they were both present together?

A. They renewed their offer to give me a Cross Vapor Phase treating plant in the event I would buy a Cross cracking plant.

Q. All right. State to the Court and Jury in substance what they said; that is, either one of them in the presence of the other?

A. They told me that it was a new process and they were anxious to put in an initial installment—

The Court: That is of the vapor phase?

A. Of the vapor phase treating plant, and wanted me to buy one.

By Mr. McKeever:

Q. What was said about the Cross cracking units, if anything?

A. Well, we had gone over the Cross cracking proposition a great many times, and I knew pretty well what the process was, and I had been considering the purchase of it. I had considered the purchase of other cracking plants, but when they offered me this treater royalty free I was more interested in purchasing the Cross Cracking plant.

Q. That is what I am getting at now. State the conversation with reference to what this offer contained that they made you that day?

A. Well, they offered me a Cross vapor phase treater royalty free if I would purchase the Cross cracking plant from the Gasoline Products Company and give the erecting of the plant to the M. W. Kellogg Company.

Q. The erecting of your plant to be made by the Kellogg Company?

A. The Cross cracking plant.

Q. How about the erecting of the Vapor Phase treating towers?

A. That was to be erected by the Gasoline Products Company at their expense, and in the event that it did not work

why there would be no charge against me. They were [fol. 57] to erect it at their own risk and if it failed why I was to lose nothing.

Q. What if it did not fail?

A. If it did just what they said it would then I was to pay the actual cost of its erection and no royalty.

Q. Now, then, did they represent to you or tell you how it would perform?

A. I knew the process— Yes; they told me that the vapors passed through this tower that was charged with Fuller's earth and the Fuller's earth was impregnated with copper and as the vapors passed through the tower it was to produce a gasoline that was at once merchantable; to be sold immediately; and that it operated in conjunction with the cracking plant, and the gasoline was all processed at one pass through the two apparatuses.

Q. What reply did you give them with reference to their proposition that you have just related?

A. Well, I told them that I wasn't quite ready to close up or buy their plant, or either of them; not at that time. At this conference the matter of infringement came up. I might say in December Mr. Keith had been urging me to buy one of their plants and buy also a Gray vapor phase treater upon which I would have to pay a royalty.

Q. Of how much a barrel?

A. Six cents a barrel. When he came back in January he said "We have this new development and we will give it to you royalty free."

Q. Now, you say the question of infringement came up. Did that come up when Keith and Welling were both there on that occasion?

A. Yes.

Q. What was said about that?

A. They said that there was no infringement against the Gray patent, and I had had some information, and I think perhaps directly from the Gray people, that the Gray people thought this new process was going to infringe their process; but Keith and Mr. Welling assured me that it wouldn't.

[fol. 58] Q. Did they go into it sufficiently to detail the difference between the two?

A. Yes; they told me that the towers were designed precisely as the towers that had been designed by an old Ger-

man patent that had expired years and years ago, and that their patent only covered the copperizing of the clay.

Q. That practically ended your conversation with them, in substance, what was said?

A. Yes.

Q. Now, do you know a man by the name of Thomas H. Skofield?

A. Yes; I know Mr. Skofield slightly.

Q. Did he appear at your office in Enid along about the same time or a little later?

A. He and Mr. Keith came back February first.

Q. He came in company with Mr. Keith?

A. Yes.

Q. Did you have a conversation with them?

A. Yes.

Q. What was the subject of that conversation, and state what the conversation was?

A. Skofield was an attorney from Kansas City, and he had been working with the Cross people in examining this new patent.

Q. Did he tell you that?

A. Yes.

Q. You are now relating what he or Keith once said at this conversation as I understand you?

A. Yes.

Q. Go ahead.

A. And he was there for the purpose of assuring me—that is what he attempted to do—assure me that this Cross vapor phase treating plant was no infringement upon the Gray process, and he had the drawings and patents that were issued to seme German and English inventors years and years ago. To substantiate what he was telling me he also had a transcript of the Gray patents showing that Gray had been trying to get his patent over a period of five or six or seven years and his patent had been rejected time after time by the patent office.

Q. What that the Schofield that appeared in this case, as attorney, before?

A. Yes.

Q. Attorney for the other side? The plaintiff?

A. Yes.

[fol. 59] Q. Was anything discussed with reference to the difference on account of the copperization?

A. The clay was to be copperized and that was what constituted the Cross patent.

Q. Did they represent to you that it was patented?

Mr. Hale: Just a moment.

Q. Well, perhaps—withdraw it. Go ahead and finish your conversation upon the subject.

A. They said it was a new invention of Dr. Cross's; and I wouldn't attempt to say now whether they said it was patented or whether the applications for patent had been filed. I know they told me one or the other.

Q. Now, that was on the first day of February, 1926, you say?

A. Yes.

Q. When did you next see Mr. Keith?

A. Keith and Mr. Harvison, Vice President of the M. W. Kellogg Company, came to my office February sixth.

Q. 1926?

A. 1926.

Mr. McKeever: I now hand the reporter a paper that I ask be marked for identification as Defendant's Exhibit 2.

(Defendant's Exhibit 2 marked for identification.)

Mr. McKeever: Under agreement of counsel, without offering further identification of this exhibit, I now offer in evidence Defendant's Exhibit 2 and desire to read it to the jury.

The Court: Admitted.

(Mr. McKeever then read Defendant's Exhibit 2 to the jury.)

I am reading now under former agreement that the letter was written by Mr. Harvison, the name being written in here being the photostatic copy. There being no objection.

Q. Now was this the Mr. Harvison from whom you received this letter——

Mr. Hale: Well, one moment. That isn't the name there——

Mr. McKeever: Pardon me. I am wrong about that. I should have said Mr. Welling——

[fol. 60] Mr. Hale: No. Mr. Atwater.

Mr. McKeever: Yes. I was wrong again. H. G. A. H. G. Atwater.

Q. And is Mr. Atwater the gentleman sitting over here with counsel?

A. Well, I know Mr. Atwater. Yes.

Q. What is he? What is his connection?

A. He is the Vice President of the Gasoline Products Company.

Q. Now, who is Mr. Keith?

A. Mr. Keith is——

Mr. Hale: Just a moment.

The Court: Is he an officer of the company?

A. I don't think he was an officer of the Gasoline Products Company.

The Court: Perhaps that is as far as his information extends.

Q. Now, Mr. Champlin, is the Mr. Harvison referred to in this letter by Mr. Atwater, L. H. Harvison,—I didn't read this—C. C. L. H. Harvison, down in the corner; is that Mr. Harvison the one who appeared on this occasion with Mr. Keith?

A. Yes.

Q. What date was that?

A. February sixth.

Q. 1926?

A. Yes.

Q. Did Mr. Keith introduce him to you?

A. Yes.

Q. What did he say in introducing him, as to who he was?

A. He told me he was the Vice President of the Gasoline—or of the M. W. Kellogg Company, of New York City.

Q. Now, what conversation—. Was this at your office?

A. Yes.

Q. What conversation did you have with those two gentlemen on that occasion?, In substance?

A. They were there to negotiate further with me the sale of this cracking apparatus and vapor phase treating apparatus, and the negotiation of the license agreement. And——

Q. Now—well, all right, go ahead?

A. And they came into my office about eleven or eleven-thirty o'clock in the morning.

[fol. 61] Q. Give the conversation as near as you can that you had with them?

A. They renewed the negotiations. Mr. Welling—or, rather, Mr. Harvison, had come all the way from New York to assist Mr. Keith in making this sale, and they told me of the different plants that they had sold. They had sold one lately to the Marland Refining Company, and they assured me and told me that I was getting just exactly what they had been selling to the other companies at the same price that they were then selling them for; I was getting the same royalty agreement, and they—Harvison turned to his portfolio and pulled out a contract and he says, "Here is the Marland contract."

The Court: What kind of a contract?
A. Marland contract.
The Court: Morrill?
A. Marland.. M-a-r-l-a-n-d.

Q. Tell us who Marland is? Who is Marland?
A. Marland is a refiner in Ponca City, Oklahoma.

The Court: This was a contract they had with the Marland people?

A. Yes, sir. "And it is precisely the same contract we will give you, except you will have the Cross Vapor Phase Treaters in addition." He says, "You take that contract and read it," and he threw it on the table. And I was talking to him—both of them—and of course I couldn't read it right then and there, and pretty soon he picked up the Marland contract and put it back in his portfolio. I said to him, "Well, Mr. Harvison, don't you want me to read that?" He said "Yes," and then he got kind of angry, a little angry at that time; I know he flushed. He says, "Yes, read it if you want to," and he threw it back on the table; and at that time it was about lunch time and I couldn't read it just then, and wouldn't as long as those gentlemen were there,—I thought it would be discourteous to start to read something when they were present. So they got up and went to their lunch, and so did I. But prior to the [fol. 62] time I had told him that I was willing now to go ahead and buy the Cross Vapor Phase—the Cross cracking plant, and take the Cross Vapor Phase Treater; and I told them and we agreed that they would go ahead that afternoon and draw the contracts.

Q. When you told them you were willing to go ahead and take the Cross cracking plant and Vapor Phase Tower, did

you mean by that that you were to get the treater royalty free?

A. Yes.

Q. And on the promise that you stated; that they would construct it——

Mr. Hale: Please don't lead.

The Court: Yes. That is a little bit leading.

Mr. McKeever: I wouldn't have done so but for the fact—Well, all right. Go ahead.

A. They were to give it to me precisely as Mr. Welling had proposed to give it to me—and Mr. Keith—on many occasions; and it was agreed that they would go away that afternoon and get stenographers and prepare the contracts and I was to meet them that evening at the Oxford Hotel at seven-thirty.

Q. At Enid?

A. Yes.

The Court: You were going to put the agreement in writing?

A. They were to prepare the contracts. I didn't see them any time during that afternoon but at seven-thirty I went to the Hotel, and as I stepped into the lobby I met Mr. Gray of the Gray processes corporation. There are several of the Grays, but I am not able to identify which one, but he was connected with the Gray Processes Corporation. He said, "Well, how are you getting along?" I said, "All right"——

Q. Was that in the presence of Keith or Harvison?

A. No. Just met Mr. Gray in the hotel. He said, "How are you getting along——"

Q. Excuse me, I am not asking for that conversation with Mr. Gray. I don't want your testimony to include that at [fol. 63] this time. Now, are you—they went to the hotel to prepare the contracts. I believe you said that, with reference to Keith and Harvison.

A. Yes.

Q. And you went there, according to appointment, after dinner. Now go ahead with Keith and Harvison and leave Gray out of it.

A. My superintendent was to meet us there and he came into the lobby soon after, and he and I went up to the room

of Mr. Keith and Mr. Harvison and found Mr. Keith and Mr. Harvison there. Well, we looked over the contracts and read them and everything was just as we expected it would be; there was no changes to be made.

The Court: What contracts were those?

A. The contracts for the erection of the plant by the M. W. Kellogg Company——

The Court: That is the Cross Cracking plant?

A. Yes. Of the Cross Cracking Plant. The license agreement——

The Court: That is the printed agreement?

A. Yes. Printed. A printed contract or a printed guarantee of performance by the Gasoline Products Company.

The Court: Guarantee that the construction by the Kellogg Company would be perfect?

A. Yes. Also——

Mr. McKeever: Just a moment. Not that the contract by the Kellogg Company—not that the construction would be perfect; but that the installation, or that the plant after installation, would perform as represented in this contract and produce the product and also capacity.

The Court: Yes. I used "perfect" in a general sense.

A. And the fourth instrument proposed to give me the Cross Vapor Phase Treating Plant royalty free.

The Court: You say "proposed"?

A. Well, the letter is here, but it started out, "Mr. Champlin, Dear Sir:——"

[fol. 64] Mr. McKeever: Just a moment. I want to identify that letter at this point right now.

The Court: That would be better.

(Defendant's Exhibit 3 marked for identification.)

Mr. McKeever: I now offer in evidence Defendant's Exhibit No. 3 under agreement of counsel that that shall be used as if the original. I read this to the jury once, and I don't care now to stop to read it again. I read that in my opening statement.

Q. Now, Mr. Champlin, I will hand you this exhibit, Defendant's No. 3, and ask you if that is the instrument that you referred to—that is, the original of that——

The Court: It might enlighten us if you would just give us the substance of that.

Mr. McKeever: I will, as soon as he answers this question.

A. This is a photostatic copy of the instrument that was delivered to me that night by Mr. Harvison and Mr. Keith.

Q. On the sixth of April, 1926?

A. Yes, sir.

(Offered and admitted in evidence and read to the jury by Mr. McKeever.)

Q. That is the instrument you say that Mr. Keith and Mr. Kellogg delivered to you when they delivered the other contract?

A. Yes, sir.

Q. Mr. Harvison and Mr. Keith, I should have said. I would like to have that contract. (Produced.) I now hand an instrument to the reporter and ask that the same be marked for identification, Defendant's Exhibit 3. (So marked.) I now offer in evidence under agreement of counsel hereinbefore entered into Defendant's Exhibit 4, and I desire to read and offer it in evidence.

The Court: Admitted.

Mr. McKeever: I desire to read a portion of it to the jury. I have got it marked on my own copy, and this photostat copy confuses me.

[fol. 65] The Court: Can't you find your copy?

Mr. McKeever: Let me refer to the——

The Court: Read from your own copy and they can follow it if they want to. (Mr. McKeever reads from the printed case as follows): Under subdivision 3, I will term it, under Sec. C of Paragraph 2 as follows: The unit under test will, with one hundred per cent (100%) recycling, from not more than one thousand (1000) barrels of gas oil or kerosene having the properties hereinabove described, or from not more than two thousand (2000) barrels of such gas oil or kerosene fresh charging stock without recycling, make an average of not less than six hundred fifty (650) barrels of gasoline having the properties above described; and that the total recoverable quantity per cycle of liquid products will not be less than ninety-five per cent (95%) of the throughput per cycle. Now, if the Court please, that is

rather unintelligible now, but I wanted to read it to the jury for later reference.

Q. Now, Mr. Champlin, these contracts that were prepared by Keith and Harvison as you have related, were they delivered to you that night?

A. Copies. They were prepared in triplicate. They left with me copies of those original contracts.

Q. Before we go to the signing of those contracts, are you acquainted with a man by the name of Fred Cook or Koch?

A. Yes, sir.

Q. When did you first meet him?

A. Oh, I think in 1925 or 1926.

Q. Did he ever visit your office at Enid, Oklahoma?

A. Yes.

Q. During that time?

A. Yes.

Q. What was the occasion of his visit?

A. He wanted to sell me a Cross cracking plant also.

[fol. 66] By the Court:

Q. The same kind of a plant?

A. The same kind of a plant except the vapor phase treating which he couldn't sell me.

Q. How did Mr. Keith or Mr. Harvison, either or both of them, know of Koch? Did you discuss with them anything about Koch being there?

A. I discussed it with Keith. I couldn't say that Mr. Welling or Mr. Harvison either knew anything about it, but Keith knew all about it. I talked with Keith about it.

Q. Now what was the Koch proposition?

Mr. Hale: Just a minute, Your Honor please. We don't see the materiality of that.

The Court: I don't hardly. Here is another agent, a man who claims to be an agent.

Mr. McKeever: No, sir; I should inform the Court, the purpose of this testimony is to show the selling force of the inducement of the vapor phase system royalty free, offered by the other person.

The Court: I didn't quite get that.

Mr. McKeever: The purpose of this testimony is to show the force of the offer to give him royalty free this vapor

phase treating system which is offered by the Gasoline Products Company.

The Court: Well, if they offered it, he either accepted it or he didn't. I don't see what this other suggestion has to do with it.

Mr. McKeever: Of course the pleading and our proof and our whole case, as an important factor of it, is the fact that the inducement that caused us to buy, and the reason why they could sell, was because they offered over competitors a vapor phase system treating tower royalty free, and here is the same tower, and I want to show what the proposition was to show the inducing because of his purchase as a corroboration of the fact that we were to get this tower. It [fol. 67] corroborates the fact that we were to get this tower free and that they were to build it and put it in.

The Court: Let me understand. Wasn't this man Koch purporting to represent the same people that these other people purported to represent?

Mr. McKeever: No, sir. The explanation of that I can give. It isn't material in our judgment, but Koch and another man whose name it is unnecessary to mention had from Dr. Cross before the Gasoline Products Company got the process, they had a reservation given over to them for certain considerations that they were to have 40,000 of barrels capacity that they could sell.

Mr. Marsh: His statement is inaccurate. I am willing he should explain it, but it is very inaccurate, and whoever states this in the presence of the jury should be sworn and the question presented in proper shape.

The Court: It doesn't seem to me it has proper bearing.

Mr. McKeever: I am only getting the statement to get the case. I don't claim it has anything to do with the case.

The Court: Why not eliminate that for the present?

Mr. McKeever: I will eliminate that for the present, but I don't want to abandon it altogether, because I consider it an important factor in our proof.

The Court: Perhaps you can let it go for fifteen minutes when we take a recess? Can you do that?

Mr. McKeever: Yes.

The Court: All right.

Q. Now did you finally contract on that 6th of February when they were prepared?

A. No.

Q. And handed to you by——

A. No.

Q. Keith and Welling?

A. Keith and Harvison.

Q. Excuse me. Did you state to them any reason why you wouldn't sign that day?

A. Yes.

[fol. 68] Q. State to the jury what it was?

A. I had been negotiating a loan for sixty odd days or more to get the money to go ahead and put in this cracking equipment, and I expected almost daily to receive word that the loan had been accepted and money passed to my credit, but at that date I had received no word, and I told Harvison and Keith that the contracts were all right, they pleased me, they were perfectly—I perfectly understood them, but I couldn't sign that contract that night until my loan was completed, and I said, "You will have to wait until I get word from the bank in Chicago."

Q. What did they say to that?

A. Well, they said, "Well, we will just have to wait," which the negotiations ended about then. I went home.

Q. All right. Now then——

A. I kept the copy of the contracts however.

Q. You retained copies of the contracts?

A. Yes, sir.

Q. And a copy of Exhibit 3 which is the letter I read here?

A. Yes.

Q. You had a copy of that?

A. I might state that this Exhibit 3 was signed by Mr. Keith that evening or that night, when it was presented to me it was signed.

Q. Just as it appears now?

A. Yes, sir.

Q. Now on this particular occasion, I want you to clarify this. You said in your answer to my question of what you told them that you would take it. Now what did you mean by that? Take what?

A. I would buy the Cross cracking plant.

(Question and answer read.)

The Court: He is amplifying the word "it". That is all, as I understand it. What do you mean by "it"?

A. I meant that I would buy the Cross cracking plant to be erected by the Kellogg Company, by license from the Gasoline Products Company, and buy—take the Cross vapor phase treating plant.

Q. Now that ended your negotiations with them on that evening?

A. Yes, sir.

[fol. 69] Q. Now referring back to Mr. Schofield, in connection with the business of Keith and Harvison on that date I believe you said that one of the Mr. Grays was there?

A. Yes, sir.

Q. Now when with reference to that date was Mr. Schofield there?

A. Schofield was there February 1st.

Q. February 1st. Now did Mr. Skofield present you any information in writing concerning your German patent?

A. He had the information there with him, and he went all over it.

Mr. McKeever: I now ask to have the two instruments I now hand the Reporter marked Defendant's Exhibits Nos. 5 and 6.

(Instruments referred to marked as requested.)

Mr. McKeever: I now offer them in evidence, having been offered previously.

Q. I hand you now Defendant's Exhibits 5 and 6, and ask you if those are the sheets that were furnished you or your company with reference to the information on the German treater?

A. Yes, I should say so.

Mr. McKeever: At this time I do not desire to read these to the jury, one of them being in German, which I can't read, and the translation being with it; but the construction of it will come up as a matter later, and it is not to be now read to the jury.

The Court: He offers them both. One is the German patent, German letters patent, and the other is the translation of it. Is that right?

Mr. McKeever: Yes, sir. Mr. Marsh suggests that subject to a comparison it is a correct translation.

The Court: I had assumed you had gone over that with him.

Mr. McKeever: I couldn't because I don't understand the German.

The Court: I mean, gone over the agreement with him. That ought to be subject to that agreement, of course.

[fol. 70] Mr. McKeever: It shall be, and I now make that agreement in the record.

The Witness: I ought to say something here. I do not want the Court or jury to understand that those exhibits were left with me at that time. I don't think they were.

By Mr. McKeever:

Q. Well, are they copies of the same instruments, or the ones, or copies of them, so you can say they are the ones that were exhibited to you by Mr. Skofield?

A. By Skofield, at a later date, yes.

Q. Did you get these from Skofield, the ones we have here?

A. He sent them to me by mail.

(Document marked "Defendant's Exhibit No. 7.")

Mr. McKeever: I now offer in evidence Defendant's Exhibit No. 7, being in the same agreement, having been offered previously.

Q. I now hand you Defendant's Exhibit No. 7, and ask you if that accompanied Exhibits 5 and 6 that I have shown you?

A. It did.

Q. What was that represented to you to be by Mr. Skofield? State what he said about it? What it is?

A. The drawings of the English or German Patent, that had long expired.

By the Court:

Q. It was German; not English?

A. I think they were both the same. I am not sure about that.

Mr. McKeever: Answering the question of the Court, I think, referring to the evidence, which has not been read, that it indicates both a German and English name perhaps three or four persons. Therefore, it is referred to as the German or English Patent. As an explanation of it, I think it is a German Patent issued to an Englishman.

By Mr. McKeever:

Q. When did you next communicate with Keith?
A. February 25th.
Q. 1926.
A. Yes.
Q. By what method did you communicate with him?
A. I think it was by telephone.
[fol. 71] Q. And why did you communicate with him?
A. I received a telegram from our Chicago Bank on that day, saying that the money had passed to our credit, and, following up my promise to Keith, I phoned him that my money arrangements had now been made and that I was ready to sign the contracts, and if he would come down, I would sign them.
Q. Did you tell him that over the phone?
A. Yes.

By the Court:

Q. Were they to be signed in triplicate?
A. Yes.
Q. All three copies were to be signed?
A. Yes.

By Mr. McKeever.

Q. Did he come?
A. He came the 26th, the next day.
Q. Did he have any of the copies with him when he came?
A. Yes.
Q. Did you have some that had been left with you previously by Harvison and Keith?
A. Yes.
Q. A copy of each?
A. Yes
Q. Did you on that day sign any of the contracts?

A. I did.

Q. What did you sign?

A. I signed the contract for the construction, running to M. W. Kellogg Company.

By the Court:

Q. Construction of the Cross Cracking Plant?

A. Of the Cross Cracking Plant. I signed the Royalty Contract.

By Mr. McKeever:

Q. That is what is termed the license agreement?

A. The license agreement, running to the Gasoline Products Company. I also signed the contract guaranteeing the performance.

Q. With whom?

A. With the Gasoline Products Company.

Q. Now referring to the one termed License Agreement, which Mr. Hale exhibited here as attached to his declaration in this case, that is the one you refer to as the License Agreement, is it not, and they furnished you a copy like it?

A. Yes sir, I should say it is.

[fol. 72] Mr. McKeever: Now I want to call to the attention of the jury, to make it perfectly plain, that this License Agreement, without reading the agreement through, is signed by Gasoline Products Company, Inc. By C. H. Welling, Vice President. Approved as to form, J. B. Marsh. Attest: W. S. Hood, Secy. Seal. Signed—Champlin Refining Company. By H. H. Champlin, President. Attest: D. W. Cotton, Secy. Seal. Dated this 26th day of February, 1926.

Q. Now, for the purpose of explaining to the jury, without reading that in detail, which I think there will be no objection to, that gives you the privilege of using the Cross Cracking Units under the patent?

A. Yes.

The Court: That is really the Royalty Agreement?

Mr. McKeever: Royalty Agreement, yes, sir. I also want to call to the attention of the jury that the royalty provided in here is ten cents per barrel for what we call the throughput in recycling of the oil.

Q. Now, Mr. Champlin, did you sign up the Kellogg Contract on that occasion?

A. Yes.

(Document marked Defendant's Exhibit No. 8.)

Mr. McKeever: I now offer in evidence the exhibit which I asked the Reporter to mark Defendant's Exhibit No. 8. I take it that these all are admitted in evidence.

The Court: That is understood.

By Mr. McKeever:

Q. I now hand you Defendant's Exhibit No. 8, which is admitted to be the Kellogg Contract, or a true copy of it. You signed that on that occasion?

A. I did.

Mr. McKeever: I want to call the jury's attention to it without reading the contents of it, it merely being for the construction of the physical plant. Contract made this 26th day of February, 1926. Signed: Champlin Refining Company by H. H. Champlin, President. Attest: D. W. Cotton, Secy. The M. W. Kellogg Company by H. L. Harvison, Vice President, and blank, Asst. Secy.

[fol. 73] Q. Referring again to the Defendant's Exhibit No. 2, which is already in evidence, which has been referred to as the Contract of Guarntee, did you sign that on that date?

A. Yes.

Q. That is, when I say "on that date," I mean the 26th of February, 1926?

A. Yes.

Mr. McKeever: I want to read to the jury now that part of it which has to do with the dates and the names. (Reading.) This agreement made and entered into this twenty-sixth day of February, 1926, and so forth, by and between the Gasoline Products Company, Incorporated, New York, and so forth, and the Champlin Refining Company, a corporation organized under the laws of the State of Maine. Signed Gasoline Products Company, Inc. By C. H. Welling, Vice-President. Attest: W. S. Hood, Secy. Approved as to form, J. B. Marsh. Champlin Refining Company. By H. H. Champlin, President. Attest: D. W. Cotton, Secy.

Q. Do you know who J. B. Marsh is, that approves these contracts?

A. Yes.

Q. Is he here?

A. Yes.

Q. Is this Mr. Marsh, appearing on the other side for the Plaintiff?

A. That is Mr. Marsh, and I suppose he is the same gentleman who approved the contracts, I wasn't there.

Mr. McKeever: He is the same J. B. Marsh.

(Recess.)

Mr. Glasser: The Gasoline Products Company at some time prior to these negotiations licensed one Charles deGanahl to the extent of 40,000 barrels of the capacity of the Cross cracking units. There was no limitation upon Mr. deGanahl's right to assign any number of those barrels except that there was a one hundred mile limitation put upon some certain city. The city is immaterial. It did not apply to the city of Enid. In addition to that the Gasoline Products Company was to get nine cents a barrel from Mr. deGanahl and Mr. deGanahl had the same blueprints and the same situation exactly that existed insofar as the [fol. 74] Gasoline Products Company was concerned in the matter of licensing this process.

It is our contention that during the period of these negotiations Mr. Koch was privileged to license to us that which these people licensed to us insofar as the Cross cracking units were concerned. Now, Mr. Marsh takes issue upon that; but that will become a matter of proof later, if this other evidence is material at this time. It is our view, and it was our advice at the time, that Mr. Koch could license to us the same thing that they were licensing to us outside of the Cross vapor phase treating tower. Mr. Koch offered us that privilege on these two 2,000 barrel units for $293,000. We paid them $413,000. In other words we paid them $120,000 approximately in excess of what we would have been required to have paid Koch if we had taken it from him. Therefore we think it is evidence material for the purpose of showing that we paid these people $120,000 in excess of what was needed to have

been paid for the thing that we did get, and that in fairness the $120,000 was paid for the Cross vapor phase treater——

The Court: That may or may not be the correct deduction. They say in the first place that that is not true, that Mr. Koch was authorized to make you an offer on the same property.

Mr. Glasser: We have Mr. Koch here, if Your Honor pleases, and will put him on the stand a little later and undertake to show that he did have that right from the Gasoline Products Company through Mr. deGanahl. We have him here, and if we fail to prove that he had the right to do what we say I will say that that means the evidence ought not to be considered. That means determining whether we paid $120,000 for something that we did not get.

Mr. Marsh: Absolutely irrelevant to the pleadings; absolutely irrelevant to everything in this case.

Mr. Glasser: It is a material factor as bearing upon the reason why any business man would pay $413,000 for some- [fol. 75] thing that he could have gotten for $293,000, if they were the identical thing.

The Court: How much previous to the dates of these contracts was the alleged offer from this man Koch?

Mr. Glasser: Koch was there the day these negotiations were under way.

The Court: Then you assert you could have obtained this same plant through another agent for $100,000 less than you paid?

Mr. Glasser: Exactly.

The Court: If you can prove that, you may.

Mr. Glasser: We are undertaking to do so. If we fail we will concede frankly that the jury should be instructed that they need not consider it. We are now undertaking to show that that was the fact, and, if we fail, of course we haven't proved it.

Mr. Marsh: May we except to Your Honor's ruling?

The Court: Yes.

Mr. Glasser: We are not asking them to pay us that $120,000 back; merely as an inducement and why we entered into the contract as bearing upon the vapor phase treater.

The Court: As I understand it, he offers to show that at or about the same time of the execution of these contracts that have been executed his company,—Mr. Champlin's company,—was offered by the plaintiff here through another agent named Koch, the same Cross cracking unit——

Mr. Marsh: I do not object to that. I thought he was endeavoring to start another lawsuit at this time.

Mr. Glasser: I am merely trying to get this evidence to the jury as bearing upon the inducement that caused Champlin to pay $114,000 more——

The Court came in after recess, and the taking of testimony proceeded as follows:

(Mr. Champlin still on stand. Direct examination by Mr. McKeever continued.)

[fol. 76] Q. Just a moment, now, Judge; I want to explain a matter that might be confusing. Mr. Champlin, referring again to the license agreement attached to pla-ntiff's declaration, I call the jury's attention to the fact that it reads in the outset, "This agreement made on the 26th day of February, 1926"; in order to clear up the confusion that might arise, the same is acknowledged by C. H. Welling in New York on the ninth day of March, 1926, and shows your acknowledgment in Oklahoma on the nineteenth day of March, 1926, as being the dates on which you signed it. Now, will you clear that up for the mind of the jury after saying that you had signed it on the twenty-sixth day of February, 1926? It is the book, Mr. Champlin. The book.

(Indicating to witness.)

A. The book?

Q. Yes.

A. On February 26th I signed the instruments, at least—Mr. Keith took them and says, "I am going to New York tonight. I will start tonight, and I will have them signed in New York and then I will bring them back."

Q. Now did he bring them back?

A. He brought them back March 20th.

Q. All right. Were they in the same condition that they were when he took them away?

A. Well——

Q. Were there any changes made?

A. They had been signed by the New York offices of these several companies when he returned to Enid with them March 20th, and on one of the contracts, at least, they had interlined, over my signature, a little matter—I don't recall what it was—and Mr. Keith had me "O. K." that interlineation.

The Court: It was not an important one?

A. Sir?

The Court: It wasn't an important one?

A. I didn't like to "O. K." it, but the fact was I was in a hurry to get away from Enid. I had a sick son and was [fol. 77] considerably worried, so I did "O. K." it and passed it back to Mr. Keith. And I think my signature that day was acknowledged by an office employe. The jurat is signed by Daisy Ferguson, Notary Public, and is signed on the ninth day of March——

Q. Ninth or nineteenth?

A. Nineteenth. And I want to say that the nineteenth of March is an error; that should be the twentieth, because Mr. Keith didn't arrive until the twentieth, and I just had time to sign it—to sign up the instruments—and receive them from him, and I had to take the train and go to Baltimore with my sick son.

The Court: What day of the week was the twentieth? If you remember.

A. It was—I am quite sure it was Saturday.

Q. Now, Daisy Ferguson who took the acknowledgment—she was an employe in your office?

A. Yes.

Q. On account of the record I just wanted to clear it up. Now, Mr. Champlin, did the Kellogg Company start the construction of the Cross cracking units?

A. Yes.

Q. About when?

A. Very shortly after that. I am not sure. I think they began to ship equipment in there prior to that date.

Q. To that twentieth day of March?

A. Yes. I think some of their equipment was on the ground at that time.

Mr. McKeever: I now hand the reporter an instrument I will ask him to mark Defendant's Exhibit 9.

(Defendant's Exhibit 9 marked.)

Mr. McKeever: I now offer in evidence Defendant's Exhibit No. 9, which is the original license agreement. It has already been identified and testified to, and will be received in evidence.

The Court: It is the same one attached to the writ?

Mr. McKeever: The writ contains a copy. This is the original license agreement. Now I will ask the Reporter [fol. 78] to mark the instrument I now hand him, as Defendant's Exhibit 10.

(Defendant's Exhibit 10 marked.)

Mr. McKeever: I now offer, under the existing agreement, Defendant's Exhibit 10, and shall read it to the jury. It is suggested—and I accept the suggestion—that I withdraw that question now to go into the Koch matter. I may repeat a little of it.

(Defendant's Exhibit 9 offered and admitted.)

Q. Mr. Champlin, I believe you stated in reply to a former question that you are acquainted with Mr. Fred Koch?

A. Yes.

Q. Did he visit you at Enid?

A. Yes.

Q. What was the occasion of his visit?

A. He came to Enid in January, 1926.

Q. For what purpose?

A. He came to Enid in January, 1926, to sell me a Cross cracking plant.

Q. What proposition did he make to you in submitting his license?

A. Mr. Koch told me that he had been the chief engineer for DeGanahl,—I think the "De" stands for an honorary title or something—I am not sure. He had been chief engineer for DeGanahl in erecting a Cross cracking plant in England; and he had finished the plant and returned to America, and that Mr. DeGanahl had acquired from the Cross people in some manner the right to erect and use

forty thousand barrels capacity of the Cross cracking processes——

Mr. Hale: I object to this hearsay evidence. This is hearsay.

The Court: I know it. Are you in a position to contradict it, with evidence. If it is true, under my ruling it is admissible.

Mr. Hale: What I was objecting to was the fact that he is apparently putting in by hearsay what was told him.

The Court: Yes. I understand. That, strictly, was not admissible.

[fol. 79] Mr. Jones: Mr. Champlin conveyed all that information to Mr. Welling and Mr. Harvison.

The Court: Yes. But it might be taken as a fact through this hearsay evidence that there was such an arrangement in England. You can't prove the fact that way.

Mr. Hale: If they want to show Koch's authority they should show it by competent evidence.

Mr. McKeever: I think perhaps I can clear that up. I will ask you this question:

Q. Did you have any conversation when Mr. Welling was out there in reference to Koch?

A. I don't think I did.

Q. Did you have any with Mr. Keith?

A. Yes, sir.

Q. Did you have any with Mr. Harvison?

A. I think not. I did with Keith though.

Q. Now what did Mr. Keith tell you in reference to the right of DeGanahl or Koch to sell this license agreement?

A. He told me all right——

Mr. Hale: Just a minute. We object.

The Court: I don't think it is strictly admissible. Can't you show by better evidence than that what right he had?

Mr. McKeever: Yes, sir; I think I can. I can't do it by this witness, if Your Honor please. The fact of the matter is I don't care particularly to establish the right, the fact of the matter, the witness went into that really when I wasn't trying to develop that, so I will leave that out for the present. If it becomes material and we desire to show it, we have the evidence.

Mr. Hale: Can the witness's reply to that question be stricken out?

The Court: Yes.

Q. All right. Now what was the proposition that Koch made you?

A. He told me that he could sell us——

Mr. Jones: No, what he said.

A. —two units——

[fol. 80] Q. Well, let him go ahead.

A. —of the Cross cracking plant that would be precisely the same unit that I was proposing to buy of Keith, the material of which would cost me $276,000, and he would want a 10% erecting fee, which would bring it up to about $303,000.

Q. And what was the price quoted to you by Keith and Harvison for their erecting the plant?

A. For the same equipment I think Welling and Harvison asked $413,000.

Q. That would make a difference of approximately $110,000?

A. $110,000.

Q. Now why did you turn down the Koch proposition and accept the other?

A. With the Keith proposition he was to give me the Cross vapor phase treater royalty free, and with the Koch treaters I would have——.

Q. With the Koch crackers, you mean?

A. With the Koch crackers—pardon me—I would have to buy the Gray patents to go with it, which would cost me $76,000 of paid up royalty—paid up license, of $76,000. Then I would have to go into another treatment and treat the gasoline with chlorine, which all in all I thought would cost me as much or more than the Keith proposal of $413,000.

Q. Including the erection of the Cross vapor phase system tower?

A. Yes.

Q. Now if you had dealt with Koch Kellogg wouldn't have erected the plant?

A. No.

Mr. McKeever: It has already been identified as Exhibit No. 10. I offer in evidence now the instrument, Exhibit No. 10, as identified by the mark, and desire to read it to the jury. Western Union telegram.

A. Let me—pardon me. Can I speak?

The Court: Yes.

(Witness confers with counsel.)

Q. A suggestion of the witness. I asked you a while ago where you got those exhibits that were furnished to you by Mr. Schofield and you desired to make further explanation in regard to them. You may do so now.

[fol. 81] A. I had seen all of these exhibits when Schofield visited us in Enid. When I signed the contracts or received the contracts from Keith March 20th I imposed the promise upon Mr. Keith that I be furnished with all of that title information that Schofield had previously shown to me, and he said he would see that Schofield sent them to me, and as I said a while ago, I left that day at one o'clock for Baltimore, and Mr. Schofield sent the papers to me while I was in Baltimore.

Q. All right. Now I will read to the jury Exhibit No. 10, a telegram. Enid, Oklahoma, May the 13th, 1926. Gasoline Products Company, Inc., 52 Broadway, New York. Wire definite information when we can expect complete plans and specifications of vapor phase treating tower. Champlin Refining Company. Counsel were not listening. I asked you when the construction of the cracking unit started in.

A. Yes.

Q. And you stated, and it is in the record.

The Court: Almost immediately.

Q. Now did you send this telegram No. 10?

A. I did.

Q. What was the progress made in the construction of the cracking unit at the time you sent that telegram on May 13th?

A. Well, they were working on the plant right along, going right ahead with it.

Q. Had you at that time received any plans or specifications of the vapor phase treating towers?

A. No.

Q. Before I forget it, I want to refer back to the conversation with Keith and Harvison or Welling in connection with the conversation of your purchase of these towers, and have you state what was said with reference to the capacity of the vapor phase treating towers, if anything?

A. The towers that they proposed to give me would handle the product as it was produced from the cracking plant. Now two towers would handle it except for a shut-down period. The clay in those towers had to be changed every so often, so we provided three towers, so that one of [fol. 82] them could be down, the clay being taken out and then recharged and not interrupt the daily progress of the cracking plants.

Q. Is that what Keith, Harvison or Welling, either one of the three of them, said about it, are you relating what they said about it?

A. Yes. That is what they said the towers would do, they agreed they better put in three.

Q. Who was it agreed to that?

A. Keith, Harvison, I don't know about Welling. I don't think——

Q. Now what caused you to send this telegram on May the 13th that I just read to the jury?

A. Well, they were working ahead on the erection of the Cross cracking plant and time was passing, and I hadn't heard anything from them, I thought they ought to begin to get busy and erect a Cross vapor phase treater so it would be ready by the time the Cross cracking plant was ready to put into operation. I hadn't heard from them and I wanted to know what they were doing.

Mr. McKeever: I now hand the reporter an instrument I ask to have marked as Defendant's Exhibit No. 11.

(Marked Defendant's Exhibit No. 11.)

It is as follows: Western Union Telegram, 1926, May 13th. Enid, Okla. Gasoline Products Co., Inc., 52 Broadway, New York, N. Y. Wire definite information when we can expect complete plans and specifications of vapor phase treating towers. Champlin Refg. Co.

Q. Did you get a reply to your telegram addressed to the Gasoline Products Company of May the 13th?

A. I did.

Q. I hand you Exhibit 11 and ask you if that is the reply?
A. It is.
Q. I now desire to offer the same in evidence and read it to the jury:

May the 14th, Champlin Refining Company, Enid, Oklahoma. Keith expected here Monday. Will wire regarding [fol. 83] towers after discussion with him. Gasoline Products Company.

(Marked Defendant's Exhibit No. 12.)

Q. I hand the reporter an instrument and ask it be marked Defendant's Exhibit No. 12, and I now offer Exhibit No. 12 in evidence. I hand you Defendant's Exhibit No. 12 and ask you what it is?
A. Telegram I sent to C. H. Welling, Vice President, Gasoline Products Company, dated July 12th, I think.

Mr. McKeever: Did I offer this in evidence?
The Court: Yes, admitted. You didn't read it.
Mr. McKeever: I now read to the jury Exhibit No. 12:

Enid, Oklahoma, July the 12th, 9 p. m., 1926. C. H. Welling, Vice President, Gasoline Products Company, Inc., 52 Broadway, New York, N. Y. Mr. Keith on his vacation. Little or no progress being made on the installation of the Cross vapor phase treating towers. Stop. Kindly insist on prompt action that the towers may be in by the time the cracking plant is completed. Signed, H. H. Champlin. Received July the 13th, 1926. 8:56 a. m.

Q. Now Mr. Champlin, after you sent that telegram to Welling of date of July 12th and prior thereto had you seen Keith again since the signing up on the contracts?
A. Yes I had seen him several times.
Q. Had you had and conversation with him about the towers?
A. Yes.
Q. Will you state to the jury what conversation you had with him about the towers and as near as you can when the first conversation was after the contracts were sent when he came back?
A. Well, about the middle of May, soon after those two telegrams had passed.
Q. That is the one of May the 13th that you sent?
A. May the 14th.

Q. And the Gasoline Products Company telegram of May the 14th?

A. Yes, sir.

[fol. 84] The Court: What did they say in that telegram of the 14th?

Mr. McKeever: They said, Keith expected here Monday. Will wire regarding towers after discussion with him. Signed, Gasoline Products Company.

A. I had learned about that time that they claimed there was some doubt about the feasibility or the workability of the Cross vapor phase treaters, and they wanted me to go to New York and confer with the New York people.

Q. Now when you say "they", whom do you mean by "they"?

A. Keith wanted me to.

Q. This was during the conversation with Keith you are relating?

A. I think it was over the telephone. Anyway, we were invited to go to New York to look into the matter further.

Q. Invited by Keith?

A. Yes, and I couldn't go and I sent Mr. Glasser in my place. An attorney.

Q. Is he one of the attorneys in this case?

A. He is.

Q. For your company?

A. And he went up there and when he came back he reported that they were still in doubt about the feasibility or the workability of the Cross vapor phase treaters.

Q. Now, keeping in mind the business with Mr. Keith, will you go ahead and relate, as near as you can remember, the visits of Keith there up to the telegram I have read here of Welling of July 12th?

A. Well, Keith came several times between May and July, probably in June, and he began—did talk to me about the inadvisability of going ahead and putting in that Cross Vapor Phase treater, because it was doubtful whether it was going to be a success or not. He wanted me to change over and take some other process. In June, I think it was in June, he invited us to go to Simms Refinery in Dallas, Texas, and examine a Cross Liquid Phase treater, and I sent our superintendent down there with him, and the superintendent came back and wouldn't approve of the Cross

[fol. 85] Liquid Phase treater, didn't think it would work, and it wasn't what we wanted. Then Mr. Keith tried to sell me a Gray Vapor Phase treating tower which carried a royalty of six cents a barrel, and I wouldn't accept that, and all the time he kept saying to me, "Go ahead, and we will put in the Cross Vapor Phase treater, but it is doubtful whether it will perform as we said it would." And I tried to get him to say that they would put it in, or would not. He kept saying. "We will put it in, but it won't perform like we said it would," but he never would tell me that he wouldn't put it in.

Q. Now, referring back a little, were you told, or what was said about who should draw the plans and specifications of these Cross towers?

A. The Cross Engineering Company I think, were going to draw the plans.

Q. Whom did you talk with about that?

A. Keith.

Q. Was he connected with the Cross Engineering Company?

A. He was Vice-President of the Cross Engineering Company.

Mr. McKeever: Now I hand an instrument to the Reporter and ask that it be identified as Exhibit 13. This is a new one, Judge, and I want to identify it.

(Document marked "Defendant's Exhibit No. 13.")

Q. Mr. Champlin, I now hand you Defendant's Exhibit No. 13, and ask you if that is your office copy of a telegram?

A. It is.

Q. Did you send out that telegram?

A. I did.

Mr. McKeever: I now offer in evidence Exhibit 13, and submit it to counsel for their examination. That is one we left out before.

(Telegram passed to counsel for plaintiff.)

I now desire to read this to the jury (reading):

Enid, Oklahoma, March 29, 1926.

Cross Engineering Company, Kansas City, Missouri:

Send plans and specifications of the Cross towers and supports.

Champlin Refining Company.

[fol. 86] Q. Now, Mr. Champlin, to what towers did that refer?

A. Cross Vapor Phase treating towers.

Q. Were they the same towers you and Keith had discussed and agreed upon, as you have stated?

A. Yes. I had just returned from Baltimore, and there wasn't anything in my office in regard to the towers, so I wired right away, and that was the wire.

Q. Now, after the telegram of July the 12th, which has been identified and read to the jury, sent to Mr. Welling by you, did you get a reply from Mr. Welling in regard to that telegram?

A. I don't recall. Let me see it again, please?

(Paper passed to witness.)

A. I had several telegrams. I don't know whether I had a reply to that or not. If I have, it is in the record.

Q. If it is not in the record, then you didn't get a reply to that? Is that your answer?

A. Yes, sir.

Mr. Hale: It sounds more like your answer, to me.

Mr. McKeever: Thank you. I now hand the Reporter an instrument and ask that it be identified as Defendant's Exhibit No. 14.

(Document marked "Defendant's Exhibit No. 14.")

I now offer Defendant's Exhibit 14 in evidence.

The Court: It is admitted.

Q. I hand you now Defendant's Exhibit 14, Mr. Champlin, and ask you if you sent that telegram?

A. I did.

Mr. McKeever: I now desire to read Exhibit 14 to the jury (reading):

July 30, 1926—3:00 p. m.

C. H. Welling, Vice President Gasoline Products Co., Inc., 52 Broadway, New York, N. Y.:

Mr. Keith phones us today nothing done about installation of Vapor Phase Treating Towers stop Cross plant will be ready to try out in fifteen days stop We insist

that action be taken at once stop. Any delay in starting plant will be expensive.

H. H. Champlin.

[fol. 87] Q. Now, do you remember whether or not you got a reply to that telegram?

A. I think I did.

Mr. McKeever: I now ask that this instrument which I hand to the Reporter be marked "Defendant's Exhibit No. 15."

(Document marked "Defendant's Exhibit No. 15.")

Q. I hand you, Mr. Champlin, Defendant's Exhibit No. 15, and ask you if you sent that telegram?

A. I did.

Mr. McKeever: I now desire to offer in evidence Defendant's Exhibit No. 15.

The Witness: I ought to explain here.

Q. Go ahead.

A. That our office records were all burned, and when the trial of this came up we called or asked the Gasoline Products Company and Mr. Welling to furnish us copies of the telegrams and letters that had passed between us, and these are the copies that they have furnished us. Now there might be a wire that I sent—there might be something that I received—that is not shown here. If there is, I don't know it.

Q. But, in furnishing these copies to you at your request, which they very graciously did, there is no reply to those other two telegrams from Welling, is there?

A. No.

Mr. McKeever: Now I desire to read this Exhibit 15 to the jury.

The Court: You may gratify your desire.

By Mr. McKeever:

Q. What was the date of your fire down there, and what did it do to you?

A. It was December 8, 1927.

Q. It burned the building your office was in?

A. Yes.

Q. And destroyed the records in your office?
A. Yes, destroyed a great many; not all of them.

Mr. McKeever: Defendant's Exhibit No. 15 is as follows (reading):

[fol. 88] Enid, Oklahoma, August 2nd, 1926.

M. W. Kellogg Co., 16 Dey St., New York, N. Y.:

Our Cross cracking plants will be completed within a few days under your contract period Nothing is being done toward the installation of the Cross Vapor Phase treating units period Have wired Mr. Welling but he doesn't reply period Imperative that something be done that there shall not be any delay in starting plant.

(Signed) Champlin Refining Co.

Q. Now why did you wire Kellogg, Mr. Champlin? Kellogg Company, I should have said.
A. I had negotiations with the Kellogg people to begin with. They were the erecting engineers and manufacturers, and I couldn't hear from Welling, so I wired the Kellogg people. The Kellogg people were selling agents for these licenses of the gosaline producers.
Q. Who represented the Kellogg Company in the sale of those licenses to you?
A. Harvison and Keith.
Q. I am speaking now only of Harvison. What connection did he have with the Kellogg Company?
A. He was Vice President.

Mr. McKeever: I hand the reporter an instrument that I desire to have marked "Defendant's Exhibit No. 16."

(Document marked "Defendant's Exhibit No. 16.")

Q. Mr. Champlin, did your company have an office at the Refinery?
A. Yes.
Q. There was no destruction of any records there?
A. No.
Q. I now hand you the Defendant's Exhibit No. 16, and ask you what that is, and whether or not that was received by your Company?
A. Telegram from P. C. Keith sent from Shreveport, Louisiana, to Champlin Refining Company, P. E. Slater,

Superintendent.

Q. Was that received by your company?

A. Yes.

[fol. 89] Mr. McKeever: I now offer in evidence Defendant's Exhibit No. 16. I now desire to read to the jury Exhibit No. 16. It has been admitted in evidence, I believe.

The Court: Proceed.

Mr. McKeever (reading):

Shreveport, La., Jul. 29, 1926.

P. E. Slater, Champlin Ref. Co., Enid, Okla.:

Telegram Welling today indicates they wish proceed original proposition stop However wish more explicit understanding with Champlin stop I shall call you from Dallas on Friday

P. C. Keith Jr.

Mr. McKeever: I now hand the reporter an instrument and ask that it be identified as "Defendant's Exhibit 17."

(Paper marked "Defendant's Exhibit 17".)

Q. I hand you now "Defendant's Exhibit 17" and ask you if you received that telegram?

A. I did.

Mr. McKeever (reading "Defendant's Exhibit 17"):

Dated August 2, 1926. "Wire received. Writing fully. C. H. Wellling."

Q. Did you receive a letter from Mr. Welling?

A. I did.

Mr. McKeever: I hand the reporter a paper and ask that it be marked "Defendant's Exhibit 18."

(Paper marked "Defendant's Exhibit 18.")

Q. I hand you now "Defendant's Exhibit 18" and ask you if that is the letter?

A. Yes.

Mr. McKeever (reading "Defendant's Exhibit 18"):

"Gasoline Products Company, Incorporated," being the letterhead, "August 2, 1926. H. H. Champlin, Esq., Champ-

lin Refining Company, Enid, Oklahoma. My dear Mr. Champlin: I was very much disappointed to learn from your wire today that you have not yet completed arrangements for your treating installation as I had understood that you were discussing the matter with Mr. Keith and had hoped that a decision had been reached. Unfortunately there is not very much that we can add to such a discussion [fol. 90] that you do not already know. You will recall that upon the occasion of my visit to Enid last January, I suggested the installation of a Cross vapor phase treating process, the patent aplpications covering which are owned by Cross Development Corporation and that I further advised that because of our close relations with that company and their desire to bring about an initial installation of their treating process that an agreement could doubtless be reached with them by which a test installation of their process could be made in conjunction with the cracking process to be installed at your plant in the event that you took a license from us to cover your cracking operations; the basis of such suggestion being that one treating tower be erected, presumably one-third of your requirements, at the expense of the Cross Development Corporation, upon your undertaking to purchase it upon completion and compliance with certain test specifications to be agreed upon; such treating process to be covered by a license from Cross Development Corporation not entailing the payment of royalties upon your part. As no agreements have been entered into to that effect, although your license agreement with us covering the cracking process was entered into on February 26, 1926, we have assumed that you did not care to adopt our suggestion. As you know, our own feeling is that the installation of the Cross vapor phase treating process would result in litigation, and without hazarding an opinion as to the outcome of such litigation, we feel that the fact of its existence would be detrimental to your interests. We, therefore, feel that you have been well advised in not proceeding with the installation of the Cross vapor phase treating process. Nevertheless should you care to do so we are sure that the Cross Development Corporation is prepared to proceed along the lines of our original suggestion and if you will advise us of your continued interest we will request them to prepare and forward for your approval a form of license contract and a form embracing the terms of

test performance to be met by installation as a condition [fol. 91] to your agreement to purchase it upon completion. We understand that the merits and costs of the Cross Liquid phase treating process, as practiced by the Sims Oil Company at Dallas under license from Cross Development Corporation, and of the Gray vapor phase treating process as practiced by Barnsdall Refining Company under license from the Gray Process Company, both in conjunction with Cross cracking plants similar to your own, have been brought to your attention. We also understand that you are familiar with the terms upon which either one of these processes may be available to you. We suggest that you earnestly consider these processes as it would indeed be unfortunate to have your cracking plant completed before satisfactory arrangements for treating had been made. If there is anything further that we can do to assist you in this matter, please do not hesitate to call upon us as we desire to co-operate with you in any way that we appropriately can. With kindest regards, very truly yours, C. H. Welling, Vice President."

By Mr. McKeever:

Q. I will ask you to take the letter that I have just read to the jury and point out in the letter what statemens, if any, are not in accord with your recollection of the facts?

A. Shall I read the portions of the letter?

Q. Yes?

A. The letter states: "You will recall that upon the occasion of my visit to Enid last January I suggested the installation of a Cross vapor phase treating process, the patent applications covering which are owned by Cross Development Corporation and that I further advised that because of our close relations with that company and their desire to bring about an initial installation of their treating process that an agreement could doubtless be reached with them." The last statement "that an agreement could doubtless be reached with them" is not correct. The Gasoline Products Company were to furnish me with this Cross vapor phase treater. All he stated on that was that Mr. [fol. 92] Cross of the Cross Development Company had lately invented this process and they were interested in installing an initial process, and that they would give that to me if I would buy their cracking process.

Q. Who do you mean by "they"?

A. The Gasoline Products Company. "In conjunction with the cracking process to be installed at your plant in the event that you took a license from us to cover your cracking operations; the basis of such suggestion being that one treating tower be erected." That is not correct. We were to have treating towers—Welling agreed with me at that time that we were to have treating towers that would care for the full capacity of the Cross cracking plant, and one single tower wouldn't have done it. It would have taken two or three. And he said, "presumably one-third of your requirements." That wouldn't have done me at all. One-third of the requirement wouldn't have treated our product. I wouldn't have thought of such a thing as accepting that; neither did he at that time.

Mr. Hale: I ask that be stricken out.

The Court: That last should be.

A. (Continuing): "At the expense of the Cross Development Corporation." It wasn't to be at the expense of the Cross Development Company. It was to be at the expense of Gasoline Products Company. "Upon your undertaking to purchase it upon completion and compliance with certain specifications to be agreed upon." I was to purchase it when the plant proved to be feasible and workable; not upon any specifications yet to be agreed upon. They were already agreed upon. "Such treating process to be covered by a license from Cross Development Corporation." There never was anything said about a license,—that I was to have a license from the Cross Development Company,—they just promised me the Cross vapor phase treater royalty free. It might have taken a license, but there was nothing said about it anyway. "Not entailing the pay-[fol. 93] ment of royalties upon your part." That statement of course is correct. "As no agreements have been entered into to that effect, although your license agreement with us covering the cracking process was entered into on February 26, 1926, we have assumed that you did not care to adopt our suggestion. As you know, our own feeling is that the installation of the Cross vapor phase treating process would result in litigation." It never had been suggested to me by anybody that we would have—well, I

wouldn't say that exactly either. They told me that the reason they did not want to put it in was because it wasn't feasible; that is, it wouldn't do what they agreed it would do, and there was a matter of litigation with the Gray people that had been discussed on a great many occasions; but I had been assured that this plant wasn't any infringement of Gray's. I think that is about all.

Q. Up to the date of your receiving this letter had either Keith, Welling or Harvison, or anybody else, for the Gasoline Products Company, contended to you that you had no agreement with them for this vapor phase system treating tower?

Mr. Hale: I object.

The Court: What was that question again?

(Pending question read by reporter.)

The Court: What's the matter with that? He doesn't ask if there was anything. He asks if it hadn't been contended that there was anything. I think it is admissible.

A. Yes. Mr. Keith told me he says,—"Our people claim that you never accepted our memorandum."

Q. Now when was that discussion with Keith?

A. I should say that it was July. Possibly June or July.

Q. Now, you say that Mr. Keith—and you think it was prior to the receipt of the Welling letters—that you had conversation with him?

A. Yes.

Q. Now, I have been interrupted here by some suggestion that are valuable in connection with it, but I didn't finish that; that Keith conversation. I want you to go ahead now [fol. 94] and say what that conversation was. What he said to you and what you said?

A. Mr. Keith said that "our people say you never accepted that proposition." But he said, "You do have a contract for that vapor phase heater, and," he said, "I will stay with you fellows on it."

Q. Now, do you know what Welling referred to in his letter—was it any previous conversation you had with him—where he uses the language that it would be most unfortunate for your company not to have the installation of the treaters? Did he refer to anything that had previously gone before between you and Mr. Welling?

A. No. Not that I know of.

(Defendant's Exhibit No. 19 marked.)

Q. To refresh the recollection of the witness I hand him Exhibit 13, together with Defendant's Exhibit 19; and now did you get a reply to Number 13?

A. I think not. If we did get a reply I think it was by telephone.

Q. By telephone to thirteen?

A. Yes. I think so.

Q. Now, did you receive number nineteen along in the neighborhood of that time?

A. Well, that evidently—Evidently this is a reply to that telegram.

Q. Well, is that from the files of your office and was that received by your company?

A. Yes.

Mr. McKeever: I now offer in evidence Defendant's Exhibit Number 19.

The Court: Admitted.

Mr. McKeever: To connect that up I will read 13, which has been read to the jury. (Reading Def. Ex. No. 13.) Now I will read the letter of March 30th, 1926, which is Defendant's Exhibit 19. This is as follows:

"Kansas City, Mo., March 30, 1926.

Champlin Refining Co., Enid, Oklahoma.

GENTLEMEN: This is in reply to your telegram of the 29th, requesting plans and specifications on Cross towers and supports.

[fol. 95] Inasmuch as the details of this character pertaining to Cross installations are handled by the Jersey City office of the M. W. Kellogg Company, we promptly telegraphed your inquiry to them and you will, we are sure, receive this information from them promptly.

If you experience any delay in this matter, will you kindly advise us.

Very truly yours, Cross Engineering Company, by R. Mitchell.

RM. 'MCC."

Mr. McKeever: I now hand the reporter an instrument and ask that it be marked Defendant's Exhibit 20.

(Defendant's Exhibit 20 marked.)

Mr. McKeever: I offer Exhibit 20 in evidence and will read it to the jury: It is as follows: Telegram. Dated Enid, Oklahoma, August 5, 1926.

"M. W. Kellogg Co., 7 Dey St., New York:

Letter from Welling received period we cannot accept his version of agreement to install cross vapor phase treating towers period we hold stipulation signed by Cross Engineering Company covering installation of treating towers period we are depending upon such installation for treating our gasoline in as much as Mr. Harvison and Mr. Keith your selling agent were parties to this agreement suggest that all erecting operations be stopped until all differences are adjusted.

H. H. Champlin."

Mr. McKeever: I now hand instrument to the reporter to be marked Defendant's Exhibit No. 21.

(Defendant's Exhibit No. 21 marked.)

Mr. McKeever: I offer Defendant's Exhibit 21 and shall read it to the jury.

The Court: Admitted.

[fol. 96] Mr. McKeever (reading): Telegram dated August 5, 1926, to H. H. Champlin, Champlin Refining Co., Enid, Oklahoma.

"Your telegram received Please forward us via air mail copy of treating tower proposition signed by Cross Engineering Company referred to in your wire Stop In meantime we will continue construction of cracking plant according to contract.

The M. W. Kellogg Co."

Mr. McKeever: I now hand reporter an instrument and ask that same be marked Defendant's Exhibit No. 22.

(Defendant's Exhibit 22 marked.)

Mr. McKeever: And I offer same in evidence.

The Court: Admitted.

Mr. McKeever: Defendant's Exhibit 22 reads:

"Enid, Oklahoma, August 5, 1926.

M. W. Kellogg Company, 90 West Street, New York, New York.

GENTLEMEN: Complying with your telegram of August 5th we are pleased to herewith hand you copy of the proposal made by the Cross Engineering Company covering the installation of Vapor Phase Treating Towers.

We beg to advise you that your Mr. Welling was present with Mr. Keith some time in January and agreed to the installation of the Cross Vapor Phase Treating System; that Mr. Harvison, your Vice President, was with Mr. Keith during the month of February when the contract covering the erection of the plant by the M. W. Kellogg Company, the Royalty Contract with the Gasoline Products Company, the Guarantee of Performance by the Gasoline Products Company, and the contract for the installation of the Vapor Phase Treating Towers by the Cross Engineering Company were prepared. Also that during the month of February Mr. W. H. Schofield, attorney at [fol. 97] Kansas City, accompanied Mr. Keith, visited us for the purpose of assuring us that the Cross Vapor Phase Treating System was not an infringement upon the Gray process. Our attorneys have investigated the processes, and are of the opinion that there is no infringement.

We have relied implicitly upon the Gasoline Products Company complying with the written proposal enclosed. We have made no preparation for any other treating process and shall not.

Hoping that the matter can speedily be adjusted and that the towers may be immediately erected, that there may be no delay in the starting of the cracking plant when completed, we are,

Yours very truly, Champlin Refining Company, by H. H. Champlin, President.

HHC: SM."

Q. Now, Mr. Champlin, did you get reply to that last letter I read to the jury?

A. I don't recall of any.

Mr. McKeever: I hand a document to the reporter and ask that it be marked Defendant's Exhibit 23.

(Defendant's Exhibit 23 marked.)

Mr. McKeever: I offer Defendant's Exhibit 23.
The Court: Admitted.
Mr. McKeever: I will read Defendant's 23 to the jury:

"1926, August 13th.

C. H. Welling, Vice President Gasoline Products Company, 52 Broadway, N. Y.:

Owing to your failure to install Cross Vapor Phase Treating Towers as provided in agreement of February sixth comma and without waiving any of its provisions [fol. 98] comma we will let contract tomorrow for installation of treaters comma that there may be as little delay as possible in starting our cracking plant.

H. H. Champlin."

Mr. McKeever: I now hand the reporter an instrument and will ask that it be marked as Defendant's Exhibit Number 24.

(Defendant's Exhibit No. 24 marked.)

Mr. McKeever: And I will offer Exhibit 23 and will read it *ot* the jury.
The Court: Admitted.
Mr. McKeever (reading):

"August 19, 1926.

Mr. H. H. Champlin, Champlin Refining Company, Enid, Oklahoma:

Reference your telegram have not replied sooner owing absence from city stop See letter following.

C. H. Welling."

Q. Did you get a letter from Mr. Welling in accordance with the expression in that telegram I just read, Mr. Champlin?
A. I think so.

Mr. McKeever: I now hand the reporter an instrument and ask the same be identified as Defendant's Exhibit No. 25.

(Marked Defendant's Exhibit No. 25.)

(Read in evidence.)

It is as follows:

Gasoline Products Company (Heading)

August 19, 1926.

H. H. Champlin, Esq., Champlin Refining Company, Enid, Oklahoma.

DEAR MR. CHAMPLIN: Upon our return to the city after a short absence I received your wire of August 13th and am at a loss to understand your reference to a failure upon [fol. 99] our part to install treating towers under an agreement of February 6th. No contract or agreement has been entered into to such effect between your Company and ourselves.

The only contracts existing between the Champlin Refining Company and the Gasoline Products Company, Inc., are a license agreement dated February 26, 1926, relating to your practice of the Cross Cracking Process, and an agreement of the same date concerning a guaranty of performance of the apparatus which you are installing for the practice of said process.

We had thought that our letter of August 2nd would make the position quite clear to you and regret that such does not appear to be the case. We would be very glad to have a more full expression of your views than that contained in your telegram of August 13th.

Very truly yours, Gasoline Products Company, ——
——, Vice-President.

CHH-HT.

Mr. McKeever: Now I might state here to counsel on the other side, some of these exhibits I am reading, the name of the signer as Vice President does not appear and it will be incomplete in the record unless that——

The Court: I don't know as you can do that if it doesn't appear there.

Mr. McKeever: By the agreement of the offer before is how I do that, being copies furnished us by the Gasoline Products Company. The initials do appear, I will say to the reporter, and with counsels' agreement they can tell which Vice President signed, and that will make the record.

Mr. Jones: There is just one more on that same line.

Mr. McKeever: I now hand the reporter an instrument I ask to have identified as the Defendant's Exhibit No. 26.

(Marked Defendant's Exhibit No. 26.)

(Read to the jury.)

It is as follows:

[fol. 100] Champlin Refining Company, Enid, Oklahoma

H. H. Champlin, President

August 25, 1926.

Mr. C. H. Welling, Vice-President Gasoline Products Company, 52 Broadway, New York, New York.

Dear Mr. Welling: Your letter of August 19th is received.

We are very sorry that this controversy has arisen. We considered that we had a definite commitment from the Gasoline Products Company to erect a Cross Vapor Phase treating plant in connection with the Cross Cracking stills.

We do not abandon the validity of the commitment, although and inasmuch as your company haven't made any move toward erecting the treating plant, and inasmuch as the time for its use is growing near, we have let contracts and are preparing to install a treating plant to the best of our ability. We felt forced to do this in order to get the plant in operation as soon as possible, and thus minimize the losses caused by the delay.

Very truly yours, Champlin Refining Company, by H. H. Champlin, President.

HHC: SM.

The Court: I think we will have to leave there and we will suspended until to-morrow morning at half-past nine.

(Suspended.)

[fol. 101] Index to Witnesses

| Name | DX | CX | RDX | RCX |
|---|---|---|---|---|
| H. H. Champlin (resumed) | 122 | 158 | 193 | 202 |
| | | | 205 | |
| R. Mitchell | 207 | 218 | | |
| E. J. Slater | 219 | 245 | | |

Forenoon Session, Wednesday, April 24, 1929

The Court came in pursuant to adjournment at 9:30 a. m.

Direct examination of H. H. Champlin resumed:

Mr. Keever: I now hand the Reporter an instrument and ask that the same be marked and identified as Defendant's Exhibit 27.

(Document marked Defendant's Exhibit 27.)

Mr. McKeever: I offer now Exhibit 27 in evidence.

(Admitted.)

Mr. McKeever: I read same to the jury (reading):

Enid, Okla., Sept. 17, 1926.

M. W. Kellogg Company, 7 Dey St., New York, N. Y.:

Mr. Hays is asking us for a letter of acceptance on our Cross cracking plant stop Inasmuch as there are some matters unsettled involving yourselves the Gasoline Products Company and the Champlin Refining Company we believe all matters in dispute should be adjusted at this time.

McKeever, Moore and Elam, Attorneys for Champlin Refining Co.

Copy handed Mr. Harvison.

Q. Mr. Champlin, who was Mr. Hays, referred to in that?

A. He was the constructing engineer in charge of the erection of the Cross Cracking plant.

Q. For whom?

A. For the M. W. Kellogg Company.

[fol. 102] Mr. McKeever: I hand the Reporter an instrument and ask that the same be identified as Defendant's Exhibit 28.

(Document marked Defendant's Exhibit 28.)

I offer the same in evidence.

(Admitted.)

I read it to the jury as follows (reading):

Stationery of Champlin Company

Sept. 18th, 1926.

M. W. Kellogg Company, New York City, New York.

GENTLEMEN: On February 6th, 1926, the Cross Engineering Company, by P. C. Keith, Jr., Vice President, furnished us an instrument in writing stating it was at the direction of Mr. C. H. Welling, Vice President of the Gasoline Products Company, Inc., with reference to the installation of a Cross Vapor Phase System Treating Tower in connection with the Cross Cracking Plant System.

We contend that the instrument furnished us by the Cross Engineering Company, which Company now own, is a Contract under which our Company has certain rights. If the Contract is not that of the Gasoline Products Company, Inc., then it is the Contract of the Cross Engineering Company, which you own.

We therefore accept the physical construction of the Cross Cracking plant installed by you as being in compliance with the contract of February 26th, 1926, and, we hereby tender settlement by cash and notes in full for the installation of the Cross Cracking Plant System, except, should the Gasoline Products Company repudiate or disprove the Agency of the Cross Engineering Company in executing the above mentioned instrument, dated February 6th, 1926, then and in that event we will hold your Company [fol. 103] and the Cross Engineering Company liable for whatever damage we sustain by reason of the non-fulfillment of the terms of said instrument.

Yours very truly, Champlin Refining Company, by H. H. Champlin, President.

Q. Mr. Champlin, did you deliver the cash and notes to the M. W. Kellogg Company and make settlement for the plant when it was constructed?

A. I delivered the check and the deferred payments by notes to Mr. Keith, and he took them to New York with him.

Q. The terms of the contract were that a certain amount was to be paid in cash when completed and a certain amount evidenced by the deferred payments by promissory notes?

A. Yes.

Q. Those were executed and delivered through Mr. Keith to the M. W. Kellogg Company?

A. Yes.

Q. And the notes were subsequently paid according to their terms?

A. Yes, the notes were all paid. I might be mistaken. They might have been delivered to Mr. Hays. I took them up to the station and delivered them either to Mr. Keith or to Mr. Hays.

Q. Anyhow they were delivered and paid?

A. Yes, delivered and paid.

Q. At the time of the completion of the plant, the cracking units, by the terms of your contract it is evidenced that a certain test was to be made in running those cracking stills?

A. Yes.

Q. Was that done?

A. No.

Q. Well, how much of a test was made?

A. Well, we tested them ourselves. We were satisfied that the stills would perform as represented and contracted with us, but the company never completed their test.

Q. Well, anyhow, you made no objection to that?

A. No.

[fol. 104] Q. You were satisfied to make a test with your own men and you did so?

A. Yes, sir.

Q. I will ask you this: Was that test made on the basis of the representations made to you as to what performance it would do?

A. Yes.

Q. And did it comply with that performance promised by the Gasoline Products Company?

A. Yes, it satisfied us.

Mr. McKeever: Now I hand the Reporter an instrument and ask that the same be marked Defendant's Exhibit No. 29.

(Document marked Defendant's Exhibit No. 29.)

I now offer Exhibit No. 29 in evidence.

(Admitted.)

The Witness: I might add that there be no confusion, it was satisfactory so far as the cracking plant was concerned.

Q. That is what I mean, the physical operation of the cracking plant.

A. The cracking plant, but not of any vapor phase treating system.

Q. You didn't have any treating system?

A. No.

Q. None to test?

A. Not at that time.

Q. So the satisfaction you acknowledged was merely satisfaction with the operation and performance of the two cracking Cross units?

A. Yes.

Mr. McKeever: I now read Defendant's Exhibit No. 29 to the jury (reading):

September 20th, 1926.

Mr. H. H. Champlin, President the Champlin Refining Co., Enid, Okla.

Dear Sir: We beg to acknowledge receipt of your letter of September 18th accepting construction of, and enclosing payment for the Cross Cracking Plant built by us for you under contract of February 26, 1926. Please accept our sincere thanks.

[fol. 105] With reference to the other matters mentioned in your letter, we beg to respectfully call your attention to the fact that those other matters have no bearing whatever

on our contract with you of February 26, 1926, and cannot alter or modify same in any way.

Yours very truly, —— ——, Vice President.

This being signed L. H. H. It has been agreed that this letter was signed by L. H. Harvison, Vice President.

The Court: Of the Kellogg Company.

Mr. McKeever: Of the M. W. Kellogg Company, yes.

I now hand the Reporter an instrument and ask that it be marked Defendant's Exhibit No. 30.

(Document marked Defendant's Exhibit No. 30.)

I now offer it in evidence.

(Admitted.)

I now read it (reading):

September 29, 1926.

Mr. H. H. Champlin, President the Champlin Refining Co., Enid, Okla.

Dear Sir: Referring to proposition of February 6, 1926, made to you by the Cross Engineering Company (which Company has since that time been taken over by The M. W. Kellogg Co.) for the building of a treating plant to treat the gasoline to be made by your Cross Cracking Plant, you have never accepted that proposition, either formally or informally, and have, we understand, undertaken the construction of your own treating plant.

We therefore herewith withdraw and cancel the Cross Engineering Company's proposition to you of February 6, 1926.

Yours very truly, —— ——, Vice President.

[fol. 106] It has been initialed LHH, and it has been agreed that this is a copy of the original letter signed by L. H. Harvison.

Mr. McKeever: I hand the Reporter an instrument and ask that it be marked Defendant's Exhibit No. 31.

(Document marked Defendant's Exhibit No. 31.)

I offer it.

(Admitted.)

I will read it to the jury (reading):

October 8, 1926.

M. W. Kellogg Company, 7 Day St., New York, N. Y.:

Your letter of the twenty-ninth ultimo is received period We insist that time after time we asked for the fulfillment of contract of February sixth period We do not accept your alleged withdrawal and cancellation period We now renew our demand on you to fulfill contract period Nothing on our part has occurred to prevent same period Kindly wire us your further decision at once.

Champlin Refining Company.

I hand the Reporter an instrument and ask that it be marked Defendant's Exhibit No. 32.

(Document marked Defendant's Exhibit No. 32.)

Which I now offer in evidence.

(Admitted.)

I now read to the jury Exhibit 32 (reading):

October 11, 1926.

The Champlin Refining Co., Enid, Okla.

Dear Sirs: We received your telegram of October 8th with reference to our letter of September 29th and proposition to you of the Cross Engineering Co. dated February 26, 1926.

[fol. 107] Our withdrawal of this proposition was, of course, based on our understanding that you were making other arrangements for your treating towers. If, however, that is not the case and you wish us to go ahead with the building of your towers as covered by that proposition, we would appreciate your forwarding us your formal acceptance of same, which we have never received.

Yours very truly, ——— ——, Vice-President.

Initialed "LHH," it being agreed that that is signed by L. H. Harvison, Vice President of the M. W. Kellogg Company.

I now hand the Reporter an instrument and asked that it be marked Defendant's Exhibit No. 33.

(Document marked Defendant's Exhibit No. 33.)

I now offer it in evidence.

(Admitted.)

I now read the same to the jury (reading):

October 20, 1926.

Mr. H. H. Champlin, President the Champlin Refining Co., Enid, Okla.

DEAR SIR: We have your telegram of October 19th referring to conference with Attorney Glasser, etc.

As we showed when Attorney Glasser was here, from our point of view, all fairness and that we are doing our utmost to please you, we regret exceedingly to receive this telegram.

Of the two alternatives you suggest we must select the one of renewing the proposition written you on February 6th, 1926, which was covered to you by our letter of October 11th, 1926, by Mr. Harvison, and that is, if you wish us to go ahead with the building of your tower as covered by the proposal of February 6, 1926, we would appreciate [fol. 108] your forwarding us your formal acceptance of same as a preliminary to drawing up a contract between us as we have never received any formal acceptance.

Yours very truly, ——— ———, President.

Signed by M. W. K. M. W. Kellogg. It being agreed it is signed by M. W. Kellogg, President of the M. W. Kellogg Company.

Mr. McKeever: I now hand instrument to the reporter and ask that the same be marked and identified as Defendant's Exhibit No. 34," which I now offer in evidence and read to the jury.

(Instrument marked "Defendant's Exhibit No. 34.")

Mr. McKeever (Reading "Defendant's Exhibit No. 34"):

"Enid, Oklahoma, October 26, 1926.

M. W. Kellogg Company, 7 Day Street, New York, N. Y.:

Letter received. We again accept proposal of February 6th to install Cross vapor phase treaters but warn you they

must do just what they were represented to do or we assume no liability.

(Signed) H. H. Champlin."

Q. Mr. Champlin, now going back to the month of June was there started some negotiations between your company and the Gasoline Products Company or its agents, or persons acting for it, with reference to putting in these treating towers; that is, were some efforts made?

A. Yes; we were negotiating.

Mr. McKeever: I now hand an instrument to the reporter which I desire to have identified as "Defendant's Exhibit No. 35."

(Paper marked "Defendant's Exhibit No. 35.")

Q. Do you know Mr. Rudolph Mitchell?

A. Yes.

The Court: Just what do you mean by "negotiating"——

Mr. McKeever: This is merely preliminary, and then I expect to show what was done.

[fol. 109] Mr. McKeever: I offer in evidence "Defendant's Exhibit No. 35," being one of the instruments offered before, and within our agreement, and desire to read the same to the jury. (Reading:) On the letterhead of the Cross Engineering Company.

"Kansas City, June 10, 1926.

Champlin Refining Company.

Attention Mr. P. E. Slater

GENTLEMEN: We are enclosing herewith an estimate and drawings covering three vapor phase treating towers for your two 2,000 barrel Cross cracking units. The price of the material using the bucket hoist and screw conveyor would be $18,002.00. We believe that the bucket hoist and screw conveyor is more satisfactory than electric hoist and trolley. However, we have shown on the bottom of the estimate the cost of this latter equipment. The labor of installing these towers including everything should run approximately $3,500.00, making a total cost for installing the towers of $21,502.00. Probably the best method of re-

moving this clay from the towers would be by means of small dump cars operating on a narrow gage track. We are enclosing herewith prices of dump cars, trackage, and switches. The cost of this equipment would, of course, depend upon the length of the track.

I shall make an effort to get to Enid within a very few days and go over with you the proposed compounding plant and these towers.

With kindest personal regards, I am,

Very truly yours, Cross Engineering Company, by R. Mitchell."

Q. Who was Mr. P. E. Slater?
A. Our superintendent.
Q. At that time?
A. Yes.
Q. That is, superintendent of the refinery?
A. Yes.
Q. And is the Cross Engineering Company, signing this letter, the company of which Mr. Keith was then Vice President?
A. Yes.

[fol. 110] Mr. McKeever: I now hand the reporter another instrument which I desire to have marked "Defendant's Exhibit No. 36."

(Paper marked "Defendant's Exhibit No. 36.")

Mr. McKeever: I offer "Defendant's Exhibit No. 36" in evidence, and read the same to the jury:

"June 22, 1926.

Kansas City Structural Steel Co., Kansas City, Kansas.

GENTLEMEN: We are enclosing herewith one blue print each of drawings number 164-1, 2 and 4, showing steel polymerizers and supports. Please make proposal on fabricating the steel shown on these drawings, to be delivered to the Champlin Refining Company, Enid, Oklahoma. Please make your quotation direct to the Champlin Refining Company, to the attention of Mr. P. E. Slater.

Very truly yours, Cross Engineering Company."

Initialed by "R. M.", it being agreed that R. Mitchell signed the letter, being one of the instruments offered in evidence at a former trial.

Mr. McKeever: I now hand the reporter two instruments which I desire to have marked and identified as "Defendant's Exhibits Nos. 37 and 38."

(Papers marked "Defendant's Exhibit No. 37" and "Defendant's Exhibit No. 38.")

Mr. McKeever: I offer "Defendant's Exhibit 37 and 38" in evidence, but will not read them to the jury, being same as "Defendant's Exhibit 36," only relating to different steel structural companies.

Mr. McKeever: I now hand the reporter an instrument I desire to have identified as "Defendant's Exhibit No. 39."

(Paper marked "Defendant's Exhibit No. 39.")

Mr. McKeever: I offer "Defendant's Exhibit No. 39" in evidence and read the same to the jury, which is as follows:

"Kansas City Structural Steel Company, Kansas City, Kansas

[fol. 111] June 29, 1926.

Attention Mr. P. E. Slater

Receipt is acknowledged of your inquiry of the 26th. We propose to furnish all the structural steel, floor plates, stairway, ladders and necessary field bolts required for Vapor Phase towers fabricated and painted in accordance with your drawing number 164-2 for the total sum of thirty-one hundred ninety-five dollars. We further propose to furnish the steel, steel sash, galvanized iron, doors, flashing, sheet fasteners, and field bolts required for one pump house fabricated and painted in accordance with your drawing number 164-5 for the total sum o two hundred forty-three dollars. This price does not include the glass nor putty. Prices quoted cover delivery F. O. B. cars Enid, Oklahoma. We can make shipment complete within four weeks. Trusting that we may be favored with your order we remain,

Yours very truly, Kansas City Structural Steel Company, by J. A. Vance.

Copy original proposal sent to Mr. Mitchell care of Cross Engineering Company, Kansas City, Missouri."

Mr. McKeever: I hand the reporter an instrument which I desire to have identified as "Defendant's Exhibit No. 40."

(Paper marked "Defendant's Exhibit 40.")

Mr. McKeever: I desire to offer in evidence "Defendant's Exhibit No. 40" and I read it to the jury: "Letterhead of the Kansas City Structural Steel Company; dated June 13, 1926; to Champlin Refining Company, Enid, Oklahoma. Attention of Mr. T. E. Slater. Gentlemen: In accordance with the request of the Cross Engineering Company, their letter of June 22nd, we are pleased to quote the following:"—then I will not take the time to read to the jury the quotation and prices,—signed by the Kansas City Structural Steel Company, by Mr. Denni.

Mr. McKeever: I read it June the thirteenth. It is June thirtieth, written out.

[fol. 112] Q. Mr. Champlin, you testified yesterday that Mr. R. Mitchell came with Mr. Keith to Enid along sometime after June the tenth 1926? You remember that?

A. Yes.

Q. Now, correspondence and calculations that I have just read have to do with the drawings that Mr. Mitchell was working on?

A. Yes, sir.

Q. The same thing?

A. Yes.

Mr. McKeever: I now hand the reporter an instrument to have marked "Defendant's Exhibit No. 41."

(Paper marked "Defendant's Exhibit No. 41.")

Mr. McKeever: I offer "Defendant's Exhibit No. 41" in evidence and read the same to the jury: "Champlin Refining Company, Attention of Mr. P. E. Slater: Gentlemen: Under date of June 30th we made you a quotation covering three polymerizers" (giving the size), and "three accumulator tanks" (giving the size), "As we have not heard from you further regarding this matter we would

appreciate it very much if you would advise the present status of this inquiry. Thanking you for an early reply, we are Very truly yours, Kansas City Structural Steel Company, by Harry Denni, Contracting Engineer."

Mr. McKeever: I hand now an instrument to the reporter and ask that the same be identified as "Defendant's Exhibit No. 42."

(Paper marked "Defendant's Exhibit No. 42.")

Mr. McKeever: I offer in evidence "Defendant's Exhibit No. 42" and read the same to the jury. Letterhead of the Kansas City Structural Steel Company, dated July 17th, 1926. "Cross Engineering Company, Kansas City, Missouri. Gentlemen: We have just received a letter from Mr. P. E. Slater of the Champlin Refining Company, with reference to our quotation of July 13th covering three polymerizers and also three accumulator tanks. In accordance with his request we are enclosing a copy of our quotation. It is our understanding that you have the contract for installing this equipment, and we trust that our [fol. 113] quotation will make it possible for you to favor us with this business. Trusting that we may hear from you in the near future, we are, Yours very truly, Kansas City Structural Steel Company. By" blank, "Contracting Engineer" being signed "H. Denni," initialed by him.

Q. Now, Mr. Champlin, during the time of this transpiring and when these letters were exchanged, and these negotiations, this covered the same time that Mr. Keith was making these visits to you, did it not?

A. Yes.

Q. The negotiations for the treating towers were in the stage of development between you and Mr. Keith, as you stated yesterday?

A. Yes.

Mr. McKeever: And I want——

Mr. Hale: That last question seems to me to be leading.

Mr. McKeever: I just—I concede that to be a little leading, if the Court please, but it is only for the purpose of connecting up. I think it is prejudicial.

The Court: Oh, no. Probably not.

Mr. McKeever: Now I hand the reporter instrument and ask that it be marked Defendant's Exhibit No. 43 for identification.

(Defendant's Exhibit 43 marked.)

Mr. McKeever: I offer Defendant's 43 and will read same to the jury.

(Defendant's Exhibit 43 marked, offered and admitted.)

Mr. McKeever: Defendant's 43 read as follows:

"Western Union Telegram

Kansas City, Mo., June 22nd, 1926.

P. E. Slater, Champlin Refining Company, Enid, Oklahoma:

Account failure finish drawings must postpone arrival Enid until Thursday morning Submitted steel drawings to Kansas City Structural Steel and Mount Copper Boiler & Iron Works today.

R. Mitchell."

[fol. 114] Mr. McKeever: I now hand the reporter instrument which I desire to have marked Defendant's Exhibit 44 for identification.

(Defendant's Exhibit 44 marked.)

Mr. McKeever: I offer Defendant's Exhibit 44 and will read same to the jury.

(Defendant's Exhibit No. 44 offered and admitted.)

Mr. McKeever (reading from Defendant's Exhibit No. 44):

"Western Union Telegram

Ponca City, Oklahoma, July 10th, 1926.

Champlin Refining Co., Enid, Oklahoma.

Attention Mr. Slater

Enid Sunday or Monday with data on treating plant.

R. Mitchell."

Mr. Hale: Pardon me, that should be "plants"; you read it as "plant."

Mr. McKeever: Yes. My attention is called to the fact that the last word in the telegram I just read is "plants," plural; not "plant" as I read it.

Q. Now, Mr. Champlin, did Mr. Mitchell come to Enid after that telegram?

A. What date was it?

Q. That was July tenth?

A. Oh, he was there I think on two or three occasions, but I could not remember them.

Q. Did he bring some drawings with him?

A. Yes. He had drawings there at one time.

Q. Now was any tower submitted to you by Mitchell of the Cross Engineering Company, evidenced by these negotiations, accepted by you?

The Court: What do you mean by "towers submitted"?

Mr. McKeever: Treating towers, from these drawings in June or July, 1926?

A. Yes.

[fol. 115] Q. What was said to Keith in your conversation with him, when he came there, with reference to these towers that the Cross Engineering Company were drawing?

A. Well, I don't remember exactly of any particular conversation with Mr. Keith on that point. Keith and I at that time were trying to work out some plan where we could go ahead with these towers to get them erected; and it had begun to get evident to us at that time that the Gasoline Products Company weren't going to act, so we began to try to get something started. And Mr. Keith had told me that the towers, as originally contemplated, wouldn't work, they weren't feasable, and that there would be no use of putting them in.

Q. Did he tell you in what way they weren't feasable, or why?

A. The copperized clay part wouldn't be feasable in that the recovery of the copper wouldn't be complete and there would be so much of it lost; and it would cost too much. The towers, however, were to be the same towers as we had here in these drawings, these estimates, submitted by Mr.

Mitchell—by the Cross Engineering Company. I told Mr. Keith we would go ahead and put the towers in and from our standpoint we would forego the copperized clay. We would accept the towers and instead of using the copperized clay we would put in the chlorine treatment; but he said his people weren't even willing to do that. At that time he tried to sell us the Gray Towers. He said that the Kellogg people were selling the Gray Towers then and he wanted to sell me the Gray Tower that carried a royalty of seventy-six thousand dollars, or thereabouts.

Q. That was prior to the time you finally did make up your mind to build one of your own, was it?

A. Yes. These negotiations were going on and finally we wired Mr.—the Gasoline Products Company—that we would go ahead and put in our own towers.

Q. That is the wire we have already offered in evidence?

A. Yes. We let a contract with the Gasoline Products [fol. 116] Company, shortly after that wire was sent, to put these towers in ourselves.

Q. Do you mean the Gasoline Products Company, that you let the contract to?

A. No. I let the contract to the Kansas City Structural Steel Company.

Mr. McKeever: I now hand the reporter an instrument that I now desire to have identified as Defendant's Exhibit Number 45, and offer the same in evidence and desire to read it to the jury.

(Defendant's Ex. No. 45 marked, offered and admitted.)

Mr. McKeever (reading from Defendant's Exhibit 45):

Law Offices of Kenyon & Kenyon, 165 Broadway, New York

September 15, 1926.

Kansas City Structural Steel Co., 21st and Metropolitan Avenue, Kansas City, Kansas.

GENTLEMEN: We are advised that you are building or contemplate the building of one or more polym-izer towers for the Champlin Refining Company to be used in connection with their Cross Cracking equipment for the refining of hydrocarbons.

We call your attention to Patent No. 1,340,889, owned by our client, the Gray Processes Corporation, for "treating petroleum hydrocarbons."

This is to notify you that your building and sale of such apparatus for the purpose stated constitutes an infringement of the said patent and will make you liable to a suit for an injunction, damages and profits.

We therefore call upon you to desist from such infringement.

Please give this matter your prompt attention and let us hear from you.

Yours very truly, Kenyon & Kenyon."

[fol. 117] Q. Now, Mr. Champlin, was that letter called to your attention?

A. Yes.

Q. From whom?

A. Kansas City Structural Steel Company sent it to me.

Mr. McKeever: I now hand the reporter an instrument which I desire to have marked and identified as Defendant's Exhibit 46, and offer same, and will read it to the jury.

(Defendant's Exhibit 46 marked, offered and admitted.)

Mr. McKeever (reading from Defendant's Exhibit No. 46):

Kansas City Structural Steel Company, Kansas City, Kans.

September 18th, 1926.

Champlin Refining Company, Enid, Oklahoma.

GENTLEMEN: We enclose herewith copy of a letter just received from Messrs. Kenyon & Kenyon, Lawyers, of New York City, in which you will note that they claim that the towers, which we have contracted to build for your Company, are an infringement upon their client's Patent No. 1,340,889. Doubtless that patent has received your consideration and we would like your instructions under the *the* present conditions.

Obviously, this Company does not want to willfully infringe a patent and stand the consequences thereof, nor, on the other hand, does it want to in any wise jeopardize or delay your work.

We would appreciate hearing from you promptly in the matter.

Yours very truly, John C. Cooper, Legal Department."

Q. Now, Mr. Champlin, were you at that time trying to have constructed the tower for the plant—the treating towers?

A. Yes.

[fol. 118] Q. And who was doing that for you?

A. Kansas City Structural Steel Company.

Mr. McKeever: I now hand the reporter an instrument I desire to have marked for identification as Defendant's Exhibit No. 47; and I offer same and shall read it to the jury.

(Defendant's Exhibit 47 marked, offered and admitted.)

Mr. McKeever (reading from Defendant's Ex. No. 47):

"September 21st, 1926.

Kansas City Structural Steel Co., Argentine Station, Kansas City, Kansas.

GENTLEMEN: Your letter of September eighteenth, addressed to the Champlin Refining Company, and from your legal department has been referred to us as attorneys for the Champlin Refining Company.

It is our opinion that you are not selling a patented article to the Champlin Refining Company, but only as mechanics you are constructing certain equipment and machinery under its order, and that you could in no way be held liable as infringing on the patent referred to.

The Champlin Refining Company is anxious to proceed with the construction work, and desires that you complete and ship such tanks and other material as has been ordered by them, and as was contemplated by the original agreement with you.

Yours truly, McKeever, Moore & Elam, by M., Attorneys for Champlin Ref. Co."

HGM:G.

By myself, "M", as attorneys for the Champlin Refining Company.

Mr. McKeever: And we offer that.
The Court: Admitted.

[fol. 119] Mr. McKeever: Now I hand an instrument to the reporter and ask the same be identified as Defendant's Exhibit No. 48. (So marked.) I now offer Defendant's Exhibit No. 48 in evidence, and I read the same to the jury, which is as follows (reading):

September 27th, 1926.

Kansas Structural Steel Co., Argentine Station, Kansas City, Kansas.

Attention Mr. A. L. Cooper, General Counsel

DEAR SIR: Answering your letter of the 23rd inst. with reference to letter of indemnity, the Champlin Refining Company does not like to indemnify against court proceedings and especially away from home in foreign jurisdictions.

We are enclosing you herewith Gray's alleged patent and we claim, as you can see by the construction you are making, that it is not an infringement, and furthermore, we invite you to interview Mr. Thos. E. Scofield, attorney, 500 Keith and Perry Building, Kansas City, Missouri, who will show you that Mr. Gray does not even have a valid patent and one on which he could recover for infringement.

Yours truly, McKeever, Moore and Elam, by —— ——.

HGM/M.
Enclos.

Q. Now Mr. Champlin, after the exchange of that correspondence was the construction of that plant stopped?
A. Yes.
Q. Was any of the material shipped to you?
A. Yes.
Q. How much in amount?
A. It might not have been shipped, but they billed us for [fol. 120] four thousand odd dollars for work and material that they had already purchased and performed, and as we could not use it why they finally gave us a credit or bought it back at about $3,300, I think.
Q. So you lost the difference?

A. Lost about $800 on that transaction.

Q. Now you refused to put up the bond, did you, that they asked for?

A. Yes, sir.

Q. Indemnity bond?

A. We didn't do it anyway.

Q. Didn't do it. Now did you proceed then to have fabricated other towers?

A. We then dismissed all these drawings and plans that they had and then went to the Kansas City Structural Steel Company who had done lots of work for us in the past, and using their draftsman why we drafted new towers and let a new contract then.

Q. Now was there any design of these towers given to the Kansas City Structural Steel Company by your company by which they were to be guided?

Mr. Hale: Just a minute.

Mr. Marsh: Every question is a leading question, the last seven or eight.

The Court: The sinfulness of leading questions depends a good deal on the witness, I think. I don't think he is leading the witness in the direction he doesn't want to go. Of course you will avoid them as far as you can. I don't think the last questions are very bad.

Q. I am trying to keep to the rule. I thought this was a plain question. I asked him if they furnished him any design.

A. I don't remember the question.

Q. Well, I will withdraw that question. Did you have in your possession at that time a drawing or design of what has been termed here as the German patent?

A. Yes.

Q. Did you give any instructions to the Kansas City Structural Steel Company with reference to following that design?

A. Yes.

[fol. 121] Q. Is that the design you followed in the final construction you did make?

A. Yes.

Q. Is that what you have now in your plant?

A. Yes.

Q. Is that the same one that you have now which was constructed under that construction?

A. Yes.

Mr. McKeever: Now I ask the reporter to mark the instrument I hand him as the Defendant's Exhibits Nos. 49, 50, 51, 52, 53, 54 and 55, for identification. (So marked.)

Mr. Champlin, I hand you the instruments marked for identification as Defendant's Exhibits Nos. 49 to 55 inclusive, and ask you if those are letters that were received by your company from the Kansas City Structural Steel Company in due course of mail as the dates indicate?

A. Yes.

Mr. McKeever: I now offer in evidence, being original offers as far as having been offered before is concerned, Exhibits Nos. 49 to 55 inclusive, as identified by the witness, for the purpose of showing the progress in the effort of the defendant with reference to erecting towers. (Shown to counsel for plaintiff.) I now read the exhibits to the jury in the order as numbered, all letters being on the stationery of the Kansas City Structural Steel Company. (Reading:)

(DEFENDANT'S EXHIBIT No. 49)

Kansas City, Kans., Sept. 27, 1926.

Champlin Refining Co., Enid, Okla.

Att. Mr. P. E. Slater

GENTLEMEN: We are sending herewith one print each of sheets 1, E1, 2, 3, 4, 6, our order 3170. Sheet 5 will be sent you to-morrow.

These are for your files and use in erection.

Very truly yours, Kansas City Structural Steel Co.
R. B. Houston, Chief Draftsman.

R. 3170.

[fol. 122] (DEFENDANT'S EXHIBIT No. 50)

Kansas City, Kans., Sept. 29, 1926.

Champlin Refining Co., Enid, Okla.

Att. P. E. Slater

GENTLEMEN: We are sending one print each of sheets E1, 1 to 6 inclusive, our order 3170, your order for vapor towers.

These are for your files.

Very truly yours, Kansas City Structural Steel Co.,
R. B. Houston, Chief Draftsman.

R. 3170.

(DEFENDANT'S EXHIBIT No. 51)

Kansas City, Kans., Nov. 4, 1926.

Champlin Refining Co., Enid, Okla.

GENTLEMEN: We are sending two prints each of sheets 1 to 6 inclusive, our order 3424, your order for single shell vapor towers.

These are complete details for files.

Very truly yours, Kansas City Structural Steel Co.,
R. B. Houston, Chief Draftsman.

R. 3424.

[fol. 123] (DEFENDANT'S EXHIBIT No. 52)

Kansas City, Kans., November 19, 1926.

Champlin Refining Company, Enid, Oklahoma.

Attention P. E. Slater

GENTLEMEN: In reference to the towers which we are furnishing you.

At the time we started fabrication on the first tower, I decided it would be best to make the diameter of these towers 11′ as originally intended instead of the 10′ 9″ as shown on our drawing. This saves the wasting of any material and will give you greater filtering area and also the tower will fit the structural work exactly as fabricated.

At the time the drawing was made, I thought it might be well to change the diameter simply to be making a change from their design but we made so many other changes that I do not think it is necessary to change the diameter.

I thought best to give you this information ahead of time so that you would not make any changes in your structural work.

Trusting this will be satisfactory, we are,

Very truly yours, Kansas City Structural Steel Co.,
by J. A. Hall, Manager Tank Dept.

jah;gh.
O3424.

(DEFENDANT'S EXHIBIT No. 53)

Kansas City, Kans., December 20, 1926.

Champlin Refining Company, Enid, Oklahoma.

Attention P. E. Slater

GENTLEMEN: Our shop in their hurry to make shipment of the vapor tower last Thursday, neglected to ship one of [fol. 124] the small accumulator tanks on same car. I just discovered this today, and asked them to make shipment immediately by local freight of one of the accumulators and hope you will receive same so that it will not cause you inconvenience.

When we tested the vapor tower, we packed the stuffing boxes with asbestos rope. I presume you have some special heat resisting packing that you will want to use on these boxes therefore, did not provide any special packing as I thought best to let you use packing which you knew would serve your purpose.

It may be that the asbestos rope packing will be sufficient but thought best to call your attention to this so that you could change the packing if you so desired before the tower was put in operation.

Very truly yours, Kansas City Structural Steel Company, by J. A. Hall, Manager Tank Dept,

jah;gh.
O—3424.

(DEFENDANT'S EXHIBIT No. 54)

Kansas City, Kans., December 21st, 1926.

Champlin Refining Company, Enid, Oklahoma.

Attention Mr. P. E. Slater

GENTLEMEN: We have for acknowledgment your favor of the 17th instant, accepting our proposal and statement to the effect that we will bill you for the total cost incurred of $4,202.69 for the material, which we had specially obtained for the vapor tanks on the order which was cancelled [fol. 125] and also accepting your offer to purchase all of such material from you and take it off your hands for a price of $3,311.56.

Our bills and credit, pursuant to this arrangement, will be forthcoming promptly.

Yours very truly, Jas. P. Cooper.

JPC*L.

(DEFENDANT'S EXHIBIT No. 55)

Kansas City, Kans., January 5th, 1927.

Champlin Refining Company, Enid, Oklahoma.

Attention Mr. P. E. Slater

GENTLEMEN: Complying with your acceptance, dated December 17th, 1926, of our proposition as stated in our letter of November 30th, 1926, to the effect that we would bill you the sum of $4,202.69, covering the cost, which we incurred on certain work that you subsequently canceled and in which proposition we offered to purchase the material so left on your hands, through the cancellation of your order, for $3,311.56.

We enclose, herewith, our debit memo for the sum of $4,202.69 and our credit memo for the sum of $3,311.56.

Yours very truly, J. P. Cooper.

JPC*L.

Mr. McKeever: That has also to do with the remittances for the payments for the construction. I will state to the

Court that some of these are not exactly in chronological order. It is almost impossible to do that. I am doing it as nearly as I can. I now hand the reporter an instrument which I desire to have identified as Defendant's Exhibit No. 56.

(Marked Defendant's Exhibit No. 56.)

[fol. 126] Mr. McKeever: This being an original and not heretofore offered, I desire to submit it to counsel. (Submitted to counsel.) There being no objection I now offer in evidence Defendant's Exhibit No. 56, and read the same to the jury as follows:

Telegram

October 1st, 1926.

Kansas City Structural Steel Co., Kansas City, Kansas.

Attention A. L. Cooper

Mr. Champlin not ready to give letter of indemnity against infringement. Better have Tulsa representative confer with him.

McKeever, Moore & Elam.

(Copy.)

Chg. Mck. Moore & Elam Acct.

Mr. McKeever: I now hand the reporter—let me get the date on that—an instrument which I desire to be identified as the Defendant's Exhibit No. 57. (So marked.) And another one which I desire to be identified as Defendant's Exhibit No. 58. (So marked.) And the same are offered in evidence.

Mr. McKeever: I will read Exhibit 57 to the jury (reading):

October 9, 1926.

Kansas City Structural Steel Co., Kansas City, Kans.

Attention Mr. Cooper

Dear Sirs: Enclosed herewith design drawing which was recently borrowed from your office.

Thanking you, I am,

Very truly yours, Initialed "HG", Harry Glasser.

Q. Mr. Champlin, was Mr. Glasser one of your attorneys at that time, handling the matter for you?

A. Yes.

Mr. McKeever: Exhibit 58 is a letter as follows:

[fol. 127] October 12, 1926.

Mr. Harry O. Glasser, Attorney, Enid, Oklahoma.

Dear Mr. Glasser: We have for acknowledgment your favor of the 9th instant with its inclosure of a design drawing. Please accept our thanks for the return of same

Mr. Hall asked me to say that he expects to leave for Enid either Wednesday or Thursday. It will be Wednesday if the design drawings can be completed tomorrow, otherwise, it will be Thursday.

Yours very truly, John P. Cooper, Legal Department.

Q. Now does that refer to the German towers that you were having erected?

A. What date is it?

Q. October 12th.

A. It must have been.

Q. Were those the ones that Mr. Glasser was having designed?

A. They were designing towers for us at that time. I could not be sure as to what Mr. Glasser had in mind.

Q. Well, I will complete that then by another witness. Now, Mr. Champlin, I think you said in your testimony that Keith told you that the Kellogg people had closed a contract or were selling agents of the Gray?

A. He told me that they had taken over the sales for the Gray towers, vapor phase towers.

Q. Which one of the times was that when he told you that?

A. Oh, the matter was discussed a number of times in July and August. He tried to sell me, he wanted me to buy, the Gray towers carrying the royalty in place of the ones that I had purchased previously.

Q. Did he offer you any extra inducement to buy those?

A. No. If I purchased them, I would have to pay a royalty. Well, in this manner, he said that the M. W. Kellogg [fol. 128] Company had authorized him to say to me that

they got a certain commission for selling the Gray towers and if I would buy the Gray towers, they would throw off their commission and thus reduce the price to me from something like $76,000 down to $57,000. There might be a little more in that matter.

Q. All right, state what it is?

A. At that time I told Mr. Keith that if the M. W. Kellogg Company would stand one-third of the $57,000 and the Gasoline Products one-third of the $57,000, that we would stand the other third in order to get the towers built, to get them started there, early in the summer, in July or August.

Q. That was never done?

A. No; they wouldn't accept that.

Mr. McKeever: Now I desire to submit to counsel a letter that wasn't in evidence before, merely for the purpose of fixing a date, one that probably Mr. Champlin can't identify, but which came to Mr. Glasser, without calling Mr. Glasser to identify it.

(Document submitted to Counsel for Plaintiff.)

Mr. McKeever: It is stipulated by counsel that the date of December 13, 1926, stated in a letter to Mr. Harry O. Glasser, from the Legal Department of the Kansas City Structural Steel Company, is the date when the signed copies of the contract for the last tower were made—the so-called German or our own tower.

The Witness: In connection with that, I am quite sure the Kansas City Structural Steel Company had been working on plans and fabricating the steel prior to the date that the contract was formally signed.

Q. Part of the fabrication of that tower was the same as the one they started to build first, was it not?

A. Not that I know of.

Q. I thought some of it, what they call the base of it?

A. Not to my knowledge.

[fol. 129] Q. Now, Mr. Champlin, when did you get your towers in operation?

A. In February, about the middle of February.

Q. Do you remember the exact date when the first tower started?

A. No.

Q. But it was in the month of February?

A. Yes.

Q. Did you commence treating your gasoline with the towers as soon as they were ready to operate?

A. Yes.

Q. Had you prior to that date been operating the cracking units?

A. Yes.

Q. What amount of stock, if you can tell, without reference to your records, was on hand of unfinished gasoline when the treating towers were ready?

A. I couldn't say.

Q. That is for Mr. Leverton?

A. We have an auditor here who can furnish those figures.

Mr. McKeever: Just a moment for a little conference, Judge, and I think perhaps we are through with this witness.

The Court: All right.

Mr. McKeever: If the Court please; with reference to this witness, we want to turn the witness over for cross examination, but wish to reserve the right on another phase of our case to recall this witness, because we cannot do it well now on account of other testimony that has not come yet.

The Court: I see no objection.

Mr. McKeever: And Mr. Glasser has a matter in connection with the witness, before he is excused, that he would like to submit to Court and counsel on the other side at the bench.

(Court and counsel confer at bench.)

Mr. Glasser: The defendant now offers to prove that the license agreement sued upon herein is in effect and use until now at the defendant's plant, and that a total thruput of 2,190,000 barrels have been processed therein to April 1st, 1929, which has earned $219,000 under such license, no part of which has been paid pending the final determina-
[fol. 130] tion of the defendant's counter claim for damages occasioned by breach of Gasoline Products obligation to furnish a Cross Vapor Phase Treating system.

The Court: Evidence now offered is excluded, as it seems to me to be entirely immaterial whether or not the

defendant owes the plaintiff more money than is claimed in the writ, as there is no way of recovering it in this action.

Mr. Glasser: May I have an exception noted?

The Court: You may.

(Exception noted and allowed.)

Cross-examination.

By Mr. Hale:

X Q. Mr. Champlin, I think you testified yesterday that you started in the oil business in 1917?

A. I started in the oil business in 1916; in the refining business 1917.

X Q. What business had you been engaged in before you started in the oil business?

A. Principally banking business and I owned a hardware store.

X Q. What experience have you had in the banking business?

A. I have been in the banging business nearly all my life; since I was, say, twenty-two years old.

X Q. Are you now an officer of a bank?

A. Yes.

X Q. What bank?

A. The First National Bank of Enid.

X Q. And what office do you hold in that bank?

A. I am president of the bank.

X Q. How long have you been president of it?

A. Nineteen years last January,—of the present bank.

X Q. And were you an officer in the bank before that?

A. Not in this bank. I was out of the banking business two or three years, and then I went back into it again.

X Q. Then you spoke of a hardware business?

A. Yes.

X Q. What business is that?

A. Retail hardware.

X Q. Is that in Enid?

A. Yes.

[fol. 131] X Q. Are you in that personally or is that a corporation?

A. That is a corporation.

X Q. Of which you are an officer?

A. Yes.

X Q. What office do you hold in that?

A. President.

X Q. How long have you been president of the hardware business?

A. Since 1907; may be 1906.

X Q. Is that conducted under your name?

A. Yes.

X Q. You went into the oil business in 1916?

A. Yes.

X Q. Just individually?

A. Yes.

X Q. Was anybody associated with you when you went into the business?

A. No.

X Q. And what did you do when you first went into the business? Did you buy some plant?

A. When I first went in?

X Q. When you first went in the oil business?

A. No; I bought a lease and started to drill a well.

X Q. And in 1917 you started in the refining business?

A. July tenth I purchased a very small plant.

X Q. That is what you call a skimming plant?

A. Yes; I started to operate it August 10th, 1917.

X Q. And was anybody associated with you then?

A. No.

X Q. It was just a personal venture?

A. Yes.

X Q. And at the same time you kept up your activity in the hardware business and in the bank?

A. Yes; through agents or superintendents.

X Q. And have ever since? You retain your interest in those other businesses?

A. Yes.

X Q. Then you went on with this skimming plant for how long?

A. Until we put in a cracking plant in 1926.

X Q. But prior to that you organized the Champlin Refining Company?

A. Yes.

X Q. The defendant in this suit?

A. Yes.

X Q. Of which I think you testified you are the president?
A. Yes.
X Q. And have been since its inception?
A. Yes.
[fol. 132] X Q. Are other members of your family interested in this company?
A. Yes.
X Q. Who?
A. My wife and my children each have stock.

Mr. Glasser: I certainly doubt the propriety of the inquiry into Mr. Champlin's personal affairs.

The Court: It is not necessary to go into his very prersonal affairs; but these things are a background I take it simply.

Mr. Glasser: The ownership of the corporation is a matter of record.

The Court: I think he will not go too far with it.

By Mr. Hale:

X Q. Are members of your family interested in an executive way in the company?
A. My son-in-law is secretary of the company.
X Q. But you yourself direct the company's policies, do you not?
A. Yes; principally.
X Q. After you had been running this skimming plant for some time you concluded, I presume, that it would be wise to put in a cracking plant?
A. Yes.
X Q. When did you reach that conclusion, as nearly as you can tell?
A. Well, it was a process of development; in 1923 and '24 and '25; I was considering it all the time. I was hampered for funds, and I might have put it in earlier had I had the funds.
X Q. But you began to consider the desirability of putting in a cracking plant as early as 1923?
A. Yes.
X Q. And concluded that it would be desirable?
A. Yes.
X Q. And the reason you did not put it in immediately was partly a matter of money and partly because you had

not made up your mind entirely as to the type of plant?

A. Yes.

X Q. But from 1923 on you were considering the best type of plant to install?

A. Yes.

X Q. And I suppose the most economical type?

A. Yes.

X Q. And the most efficient type?

A. Yes.

[fol. 133] X Q. And the type which was safe to operate?

A. Yes.

X Q. And the type which would not get you into any trouble from a patent standpoint? Is that right?

A. Yes.

X Q. What types of cracking plant did you consider?

A. The Dubb's plant; the Jenkins; the Holmes-Manley; and also the Flemming earlier in the consideration.

X Q. And the Cross?

A. And the Cross, yes.

X Q. When did you first begin to consider the Cross plant?

A. Oh, the merits of the Cross were directed to my attention early in 1924 and 1925; possibly earlier than that.

X Q. What investigation did you make or have made with respect to these different types of plants?

A. We—I shouldn't say "we" The superintendent visited different plants around over the country and would report to me the result of his investigation.

X Q. Can you tell some of the plants which the visited?

A. He visited the Marland Refining Company; the Barnsdall——

X Q. Is that the one at Ponca City?

A. Yes. The Barnsdall Refining Company at Barnsdall.

X Q. What kind of a plant did the Marland Company have?

A. They had some Flemming units first; some Dubb units, and some Cross units.

X Q. And the Barnsdall plant—where was that?

A. At Barnsdall, Oklahoma.

X Q. What sort of a cracking plant did they have?

A. They had first the Flemming, and subsequently the Cross plant process.

X Q. And Mr. Slater, your superintendent, saw both of those plants?

A. Yes.

X Q. What other plants did he examine?

A. He examined the Mid-Continent Refinery at Tulsa; the Texas plant at Tulsa.

X Q. The Mid-Continent at Tulsa; what kind of a plant is that?

A. That is a refining company, and they had a cracking [fol. 134] plant of their own construction, and I think they called it the "Coast." I think. I think it was the "Coast." Some such name, anyway.

X Q. And you mentioned the Texas Company plant?

A. Yes.

X Q. Where is that?

A. At Tulsa.

X Q. And they have what kind of a plant?

A. A Holmes-Manley.

X Q. Did he investigate some other plants?

A. Yes, he went to the Simms Oil and Refining Company's plant at Dallas, Texas.

X Q. And they have what kind of a plant?

A. I don't recall.

X Q. Any other plants that he examined?

A. I— Yes, he examined or investigated some refinerys over at Cushing. I can't name them now.

X Q. At Cushing?

A. Yes.

The Court: Is he here?

A. No.

X Q. You don't remember the name of the company or the type of the plant?

A. No.

X Q. The Atlantic Refining Company?

A. What?

X Q. The Atlantic Refining Company. Did he visit their plant at——

A. Yes. He went to Philadelphia and examined their plant.

X Q. What kind of a plant did they have?

A. I think they had a Cross Cracking plant.

X Q. Do you recall other plants that he examined?

A. Not— Well, yes. He examined a plant I think at Lawrenceville, Illinois, also.

X Q. Do you remember what type of plant that was?

A. They had a Cross plant; a Cross plant.

X Q. Did you testify in reference to the plant of the American Refining Company at Wichita Falls,——

A. I don't think I did.

[fol. 135] X Q. Did he examine a plant there?

A. Yes.

X Q. And that was a Dubbs plant, wasn't it?

A. I don't know.

X Q. Do you recall that he went to see a Dubbs unit in the Darby Oil Refining Company at Wichita Falls, Kansas?

Mr. McKeever: You can leave out the "Falls." Just Wichita.

X Q. At Wichita, Kansas?

A. I don't recall that, but I rather think he did. And further, he examined one at Arkansas City, and also one at Eldorado, Kansas.

X Q. The one at Arkansas City was a Dubbs plant—was that the one which afterwards exploded?

A. Yes.

X Q. Did you know about the explosion?

A. Yes.

X Q. As a matter of fact, you went up to make a personal investigation of the explosion, did you not?

A. Yes.

X Q. Did that give you any particular opinion about the Dubbs type of cracking plant?

A. Yes.

X Q. Favorable or otherwise?

A. Unfavorable.

X Q. You thought it was unsafe?

A. Yes. Not altogether unsafe, mind you. But it wasn't as safe as the Cross plant.

X Q. You thought explosions in cracking plants were undesirable, didn't you, Mr. Champlin?

A. Yes. You bet.

X Q. And, of course, you were anxious to have the safest type of apparatus that you could find?

A. Yes

X Q. Now, did you make any study of the patent situation with reference to these cracking plants?

A. Not a great deal.

The Court: Perhaps, before we go into that, we will take a recess of ten minutes, gentlemen.

(Recess at 10:06 A. M., for ten minutes.)

Witness: If the Court please, I would like to make a little correction in my testimony——

The Court: Certainly.

Witness: Heard just before the recess.

The Court: Certainly.

[fol. 136] Witness: I testified that I started to drill a well in 1916 and that I was the owner of it. It was a joint venture with my wife. She had funds and she put her funds in with mine and I went ahead and drilled a well, and she had a half ownership in that business, up till the time we incorporated, and then took stock for her half after that.

X Q. When was this explosing of the farm at Arkansas City?

A. I think it was in November, 1925.

X Q. You went up to witness the scene of the explosion shortly after it occurred?

A. Yes, sir.

X Q. Was there a fire at Barnsdall in the Flemming cracking plant about this time?

A. Well, I heard of one sometime in that—about that time. It was an explosion, I think.

X Q. An explosion?

A. I think so.

X Q. Sometime the latter part of 1925?

A. I don't remember.

X Q. Did that influence your opinion of the Fleming process at any time.

X Q. Why didn't you look with favor on the Fleming process?

A. Well, it was going into disuse at that time.

X Q. What other type—on what types of process did you look with some favor in the autumn of 1925?

A. The Jenkins and the Dobbs and the Cross.

X Q. That is about all?

A. And the Holmes-Manley.

X Q. Weren't you advised that the Holmes-Manley was very expensive?

A. It was a more expensive than these other—not a great deal more than the Cross, but some, perhaps.

X Q. As a matter of fact, didn't Mr. Slater advise you it would be almost prohibitively expensive?

A. Oh, I don't know as he said it that way.

X Q. In what way did he say it?

A. We concluded that it was expensive. The initial installation was very expensive. Something less than $500,000 though.

[fol. 137] X Q. In addition to the initial cost, isn't it a very expensive type of plant to operate, Mr. Champlin?

A. I think not.

X Q. Now Mr. Champlin, in the latter part of 1925 had you heard of a patent suit involving the Jenkins process of cracking?

A. Oh, there were—yes, there were patent controversies in a number of——

X Q. Did that influence your judgment of the Jenkins process any?

A. No, I don't think it did.

X Q. Do you know who were the parties to that suit?

A. The Universal Oil Company had sued the Grover Corporation for infringing.

X Q. I know, but what type of cracking process were involved in the suit?

A. Well, the Jenkins plant.

X Q. Now Mr. Champlin, in the latter part of 1925 had you in fact reached a conclusion as to which was the best type of cracking plant?

A. No.

X Q. When did you reach such a conclusion?

A. In January.

X Q. When you finally reached a conclusion as to what was the best type of cracking plant, what conclusion did you reach?

A. Well, I concluded that the Cross plant was the best inasmuch as they were going to give me this vapor phase treating.

X Q. I am not asking you that, Mr. Champlin.

A. The best proposition for me to accept.

X Q. I am not asking you that either. Didn't you sometime, Mr. Champlin, reach a conclusion as to which was the most efficient type of cracking plant?

A. No, I couldn't say that I did.

X Q. You never have reached any conclusion on that?

A. I have now. I think the Cross is the best plant.

X Q. You think the Cross is the best plant?

A. Yes, sir.

X Q. When did you reach that conclusion?

A. Well, after operating it. They were selling a great many Jenkins plants at that time. My neighbor just across [fol. 138] the street purchased a Jenkins plant. Had the same opportunity of purchasing other plants.

X Q. I guess we won't go into your neighbor's business, Mr. Champlin. Mr. Champlin, you knew as a matter of fact that the Cross cracking plant was the only type of cracking plant that could be operated in any kind of a vapor phase treater, didn't you?

A. No, I think the Gray people claimed that their plant would operate with other cracking plants. I think I have letters from the Gray Process Corporation to that effect.

X Q. I meant to have asked you in reference to the size of the Champlin Refining Company. What is its capital structure?

A. At the present time?

X Q. Yes.

A. I think we have about $7,400,000 capital and surplus.

X Q. Mr. Champlin, suppose you hadn't been buying any kind of a treating outfit at all, haven't you any idea what sort of cracking plant you better buy?

A. I think I would have bought a Jenkins.

X Q. You would have brought a Jenkins?

A. Yes, sir.

X Q. You wish to be understood that the only thing which induced you to buy a Cross was the possibility of having this vapor phase—Cross vapor phase treating proposition?

A. Yes, the Jenkins plant produced a finished gasoline at one-half just what the Cross plant would do in connection with the Cross vapor phase treaters.

X Q. So that the offer of this Cross vapor phase tower induced you to enter into a contract that you would not otherwise have entered into?

A. Yes, the Jenkins plant could have been purchased for a great deal less money. Perhaps three-fifths of what I paid for the Cross plant.

X Q. You first talked with Mr. Keith sometime in January, 1926?

A. I think I talked with him in December, 1925.

X Q. You had some talk there with him before you talked with him and Mr. Welling, didn't you?

A. Yes, sir.

[fol. 139] X Q. Now when you first talked with Keith did he tell you about this Cross vapor phase system treater?

A. Not the first time.

X Q. But along in January he did?

A. Yes, early in January he came back and told me what they could do.

X Q. He told you that the patents on this process were owned by the Cross Development Corporation, didn't he?

A. He said the Crosses had lately developed or invented a new process of treating gasoline—vapor phase treating gasoline.

X Q. He said that the patents on it were owned by the Cross Development Corporation, didn't he?

A. I wouldn't say that he said the thing was patented. He said that Dr. Cross had invented a new process.

X Q. You knew that the Cross Development Corporation owned those patents, didn't you?

A. Yes. Well, I say I don't think they were patented even. I really hardly think it was. I think perhaps they had applied for a patent.

X Q. Mr. Champlin, you remember your testimony in the trial of this case a year ago?

A. No.

X Q. You have no recollection of your testimony?

A. Oh, I testified, yes, but I don't remember altogether what I testified to.

X Q. Mr. Champlin, at that trial, page 72, the question was asked you what representations in substance were first made if any as to the process, and you replied: Well, they told me and Mr. Keith had told me prior to this meeting that

the Cross Development Company had lately developed what they termed a Cross vapor phase treating plant, to be used in conjunction with the Cross cracking plant, and if I would purchase one of their plants and their royalty agreement they would give me free from royalty this new plant that the Cross Development Company had just patented. You remember that testimony?

A. Yes.

[fol. 140] X Q. That testimony was accurate, wasn't it, Mr. Champlin?

A. Yes, I think so.

X Q. You don't wish to contradict it now?

A. No. Dr. Cross—I still say Dr. Cross had invented the process, as represented to me.

X Q. On February 6th, Mr. Champlin, when you were in the Oxford Hotel at Enid with your superintendent, Mr. Slater, and Mr. Keith and Mr. Harvison, it was discussed that the Cross Development Company owned these patents, wasn't it, or owned the patent of this Cross vapor phase?

A. I think so. Yes; I think so.

X Q. You recall that discussion now, don't you?

A. Well, yes, it was discussed.

X Q. So that there is no question but that as early as your conference on January 27th you knew that the patents on this vapor phase treater process were owned by the Cross Development Corporation?

Mr. Glasser: Just a moment. We object to that for the reason that, one thing, the question assumes the fact that it is not susceptible of proof.

The Court: He asked whether he knew something.

Mr. Glasser: Of course the question indicates that he only could have known what he was told by Mr. Keith about it. If he will predicate his question on what Mr. Keith said, we will withdraw the objection.

The Court: I see nothing very objectionable about it. The witness is very intelligent. He understands what is intended to be asked, which is, as I understand it, whether or not at that conference he had knowledge that Dr. Cross either had patented or had applied for a patent on his process. Is that right?

Mr. Glasser: That is a different statement from the one counsel just made.

The Court: Read the question.

(The question was read by the Reporter.)

[fol. 141] The Court: I didn't distinguish Dr. Cross from the corporation. I presume they may be different.

Mr. Glasser: I am asking him to distinguish between the patent and the application for a patent.

The Court: He has said he wasn't certain whether it was patented or not. He said it was either patented or a patent applied for. He may answer.

A. I didn't know they owned the patents. No one ever told me. It was just put up to me this way, that Dr. Cross of the Cross Development Company had lately developed this new process and that the Gasoline Products Company were willing and anxious and glad, on account of their connection with Dr. Cross, to give me royalty-free an initial installation of the Cross Vapor Phase treating plant. It may fairly be assumed that the Cross Development Company owned the patents, but it wasn't told to me.

X Q. You said in your testimony a year ago, Mr. Champlin, referring to Page 101, referring to Mr. Welling's visit in Enid in January, "He," that is, Mr. Welling, "urged upon us the importance of buying all the patent applications covering which are owned by the Cross Development Company. Now I knew the Cross Development Company owned the patents"?

A. Well, I didn't know it any more than I could fairly assume they owned them.

X Q. Then your testimony a year ago was not accurate?

A. Well, I couldn't say that they owned the patents. If I made that statement, it was an assumption that they owned the patents.

X Q. At all events, Mr. Champlin, you thought they owned the patents, didn't you?

A. Well, I may have thought so, yes.

X Q. You did think so, didn't you?

A. Well, it would appear as if I did think so. I still think that they owned the patents, but I don't think anyone told me that they did.

[fol. 142] X Q. Just a minute. That is all, Mr. Champlin. You may answer my questions. Mr. Champlin, this license Agreement which is involved in this suit, I think you testified, was left with you on February 6th, or one copy was left with you, is that right?

A. Which license—well, they were all left with me, so far as that goes.

X Q. Did you read all those contracts over before you signed them?

A. Yes.

X Q. And, of course, Mr. Champlin, when the matter of this Cross Vapor Phase System treating tower first came up, you understood thoroughly that it was an absolutely new thing, didn't you?

A. Yes.

X Q. That it had never been in commercial operation at all?

A. Yes.

X Q. That it was merely an invention of the Doctors Cross or one Dr. Cross, which he was anxious to put on the market so as to see whether it would work? You knew that?

A. I knew the Gasoline Products Company were anxious to put on an initial installation. I had never talked to Dr. Cross at that time.

X Q. You knew at least that somebody was anxious to put this thing on the market and to see if it would work?

A. Yes.

X Q. Now, Mr. Keith first mentioned this Cross Treater to you in January, is that right?

A. Yes.

X Q. And he described the general method of treatment by the copperized clay?

A. Yes.

X Q. Of course he didn't say anything to you about the commercial operation of the thing, did he, Mr. Champlin?

A. Why, yes, he told me what it would produce.

X Q. Well, he couldn't have told you about the commercial operation based on any commercial operation there had ever been, could he Mr. Champlin?

A. No. I supposed that had been worked out in the laboratory.

X Q. But in a dollar-and-cents way he never told you about it, did he?

A. Well, we discussed that feature of it.

[fol. 143] X Q. Did Mr. Keith ever attempt to tell you whether it would be expensive to operate? Did he attempt to tell you this in January?

A. At that time he told me it would be practically no expense to operate; it would just be a mere trifle; the only expense would be the taking out—or, putting the clay in the towers and taking it out again and treating it with copper.

X Q. Did he say anything about the expense of copper treatment?

Mr. Jones: At what time?

Mr. Hale: In January.

A. He just said that this treatment was almost free from expense; there was some expense connected with it, but it was such an improvement over anything that had been before that the expense of treating gasoline was almost nil.

X Q. You didn't request any guarantee of operating costs or operating efficiency of the tower, did you, Mr. Champlin?

A. No. You mean of the expense of operating the towers?

X Q. Yes.

A. No.

X Q. Or on the operating results?

A. No. He told me what the results would be, not in expense, but in production, what it would produce.

X Q. He told you the results chemically?

A. Yes.

X Q. Simply told you that when it had passed through this tower the chlorine treatment would be unnecessary?

A. Yes.

X Q. And that you would, therefore, save the expense of the chlorine treatment?

A. Yes, chlorine treatment and other treatment too.

X Q. Or alternative treatments, or the litharge treatment?

A. And rerunning of the synthetic gasoline through shell stills.

X Q. Now, Mr. Champlin, this letter of February 6th,

1926, which was handed to you, I think, in the Oxford Hotel on that evening, is that right?

A. Yes.

[fol. 144] X Q. That was an accurate memorandum of the oral offer which had been previously made to you?

A. I think so.

X Q. In all particulars?

A. As I recall it, yes.

X Q. At least, you made no complaint of its being inaccurate?

A. No.

X Q. When the contracts were left with you on February 6th, Mr. Champlin, you didn't feel that you were under any obligation with reference to the construction contract with the Kellogg Company, did you?

A. Well, my word was out with him, that is all. I told them that I would buy the plant as soon as my money was arranged for.

X Q. I mean under any legal obligation?

A. Well, I couldn't answer that from a legal point; no, I don't know. I think that I could have backed out probably.

X Q. If your money didn't come through, you felt you were perfectly free to back out, didn't you?

A. Yes——

Mr. Jones: That is purely a question of law that my brother is touching on now.

The Court: He asked him how he felt—not what the result was. That is all right. Go ahead.

A. (Continuing:) If my money hadn't come, of course I couldn't have gone ahead with the plant, with the erection of the plant.

X Q. By the way, was Mr. Schofield at Enid more than once?

A. Yes.

X Q. Did he come to Enid to see you more than once?

A. No; just once that I recall.

X Q. That was with Keith, wasn't it?

A. Yes.

X Q. Mr. Champlin, in May, 1926, you had Mr. Glasser go east to a conference?

A. Yes.

X Q. What was that conference, do you know?

A. He was trying to work out some plan where we could go ahead and put in some treating—vapor phase treating process.

X Q. By "he" you mean Mr. Glasser?

A. Yes.

X Q. Mr. Champlin, this Mr. Koch that you spoke of yesterday was a fairly young man, wasn't he?

A. Sir.

[fol. 145] X Q. Mr. Koch, that you testified about yesterday, was a fairly young man, wasn't he?

A. Reasonably young. I think about thirty or thirty-two.

X Q. Do you know what firm he represented?

A. Yes, at that time he was with the Winkler & Koch Engineering Company of Wichita, Kansas.

X Q. Do you know anything about the financial responsibility of that firm?

A. No.

X Q. Mr. Champlin, in your testimony in this case a year ago you made no reference to Mr. Koch, did you?

A. No.

X Q. Why was that?

A. I wasn't asked anything about Koch. I didn't think anything about it.

X Q. When did Mr. Koch occur to you in connection with this case?

A. I don't remember the first time.

X Q. Within a week, was it?

A. Oh, no; it was before that.

X Q. You hadn't thought of Mr. Koch in connection with this case a year ago at all, had you, Mr. Champlin?

A. Well, I know Koch had offered me his plant——

X Q. Answer my question fairly?

A. I didn't think of it at the trial of this case; I don't think I did. Nobody asked me anything about Koch anyway.

X Q. You do not know when you did think of Mr. Koch for the first time in connection with this case?

A. No; I wouldn't recall that.

X Q. Do you know who first suggested Mr. Koch to you in connection with this case?

A. No. In discussing it with my lawyers I think I told them about Koch offering me this plant in January, 1926.

X Q. Is Mr. Koch here?

A. Yes.

X Q. And you would have bought this plant from Mr. Koch if it had not been for the inducement of the Cross Vapor Phase treating tower?

A. I think I would have; yes, sir.

X Q. Don't you know you would have, Mr. Champlin?

A. Well, I am quite sure I would have.

[fol. 146] X Q. Mr. Champlin, when Mr. Glasser returned from that conference in May, 1926, did he speak of having seen Mr. Gray?

A. Yes.

X Q. Did you have an acid treating plant in connection with your refinery, Mr. Champlin?

A. Yes.

X Q. I mean in January, 1926?

A. Yes; we treated the straight-run gasoline with acid or litharge. I am not a refiner. There might be a litharge treatment. I don't know whether litharge is an acid or not.

X Q. Don't you have to use both?

A. I don't know. I don't think you have to use both at the same time. I think that the gasoline can be treated either with litharge or acid if it is necessary. Some gasoline it is not necessary to treat with acid; if the gasoline is already sweet.

X Q. What was the source of the crude oil for your refinery, Mr. Champlin?

A. I bought it and produced it in the Mid-Continent field.

X Q. Mr. Champlin, isn't it a fact that straight-run gasoline sold for more than cracked gasoline in the Fall of 1925 and the early Winter of 1926?

A. No.

X Q. Are you sure about that?

A. I am quite sure.

X Q. Do you know about 1926 and 1927?

A. Yes.

X Q. Isn't it true that in the latter part of 1926 straight-run gasoline sold for more than cracked?

A. Not according to my information, no. Cracked gasoline brought a premium over straight-run gasoline. Dur-

ing that period the cracking people, or the people that sold cracking processes, carried on a very extensive advertising campaign to convince the public that cracked gasoline was the best product, and they did so, and they convinced me it was the best product finally, and I think it is the best today, and I think any engineer will tell us that.

Mr. Hale: I suppose that last might be stricken out. I only asked him about prices.

The Court: If you desire it, it may be.

[fol. 147] By Mr. Hale:

X Q. When these contracts were submitted to you on February 6, 1926, they were in typewritten form, were they not, or were they printed?

A. I think they were typewritten. Part of them were anyway.

X Q. When Mr. Keith first told you that this Cross vapor treating tower would be probably prohibitively expensive was in May, wasn't it Mr. Champlin? About its being probably prohibitively expensive to operate?

A. It may have been in May. The matter was just put up to me gradually. Just kind of came in a little at a time. It finally developed, however, that the copper couldn't be recovered in sufficient quantities to make the plan feasible. The plant would do the work. That is, the copperized clay would perform just what they had represented to me. That is, they said it would.

X Q. That is, you never had any doubt about the chemical process, but you did have a doubt about the commercial process?

A. They told me that chemically it was all right. Mr. Keith said that.

X Q. But when you were told that it was impracticable commercially you believed it, didn't you, Mr. Champlin?

A. Yes. Well, I say I believed it; I didn't know anything about it. He told me it was, and Mr. Keith always was a very truthful man I always thought.

X Q. Well, you didn't disbelieve it, did you?

A. Well, I always had a high regard for Mr. Keith, and I always believed what he told me. Personally I knew nothing about it.

X Q. No, certainly not. But the only information that

you had was that it would be impracticable commercially?

A. Yes.

X Q. Mr. Champlin, had you in January, 1926, made any study of the Gray tower phase—the Gray vapor phase treating tower system?

A. No. Only what Mr. Harcourt and Mr. Keith had told me prior to that date.

[fol. 148] Mr. Hale: I have two papers here which I should like to have marked Plaintiff's Exhibit A and Plaintiff's Exhibit B.

(Plaintiff's Exhibits A and B marked, offered and admitted.)

Mr. Hale: Mr. Champlin, I show you Plaintiff's Exhibit "A", which purports to be a letter addressed to you, and ask you if you recall receiving that?

A. Yes. I have seen this letter.

X Q. And I show you Plaintiff's Exhibit B, which also purports to be a letter addressed to you, and ask if you ever received that?

A. Yes.

Mr. Hale: We offer these under the stipulation, if the Court please. Plaintiff's Exhibit "A" reads as follows:

"November 27th, 1925.

Mr. H. H. Champlin, Champlin Refining Co., Enid, Oklahoma.

My Dear Mr. Champlin: I was very sorry, indeed, not to have been able to see more of you Wednesday, but I did have the pleasure of talking to Mr. R. A. Champlin at some length. I want to make a small confession, which was I hardly recognized you at first when you were in front of the Oxford Hotel. You are looking so much better and seemed at least ten years younger than you were when I last saw you.

I wanted to call your attention particularly to the Barnsdall installation of the Cross process which they have direct connected to the Gray vapor phase treating towers. They are obtaining thirty plus color directly from the towers. The gasoline passes directly from the cracking plant into the towers and is delivered ready for marketing, without

any re-running. The Cross process is the only one which can be connected with a vapor phase treating plant in this way.

I talked to Mr. R. A. Champlin regarding this matter at some length and sent a photograph out to the refinery to [fol. 149] Mr. Slater, to see this installation and feel sure that the gasoline which is being produced there will meet your very high standards.

Very truly yours, The M. W. Kellogg Company."

Mr. Hale: That is signed, as I say, "Very truly yours, The M. W. Kellogg Company, By Guy N. Harcourt." And the second letter, Plaintiff's Exhibit B, is dated December 5th, 1925. (Reading):

"December 5th, 1925.

Mr. H. H. Champlin, Champlin Refining Co., Enid, Oklahoma.

DEAR MR. CHAMPLIN: I am enclosing herewith the photograph which I could not find in my papers the other day while I was talking to you. This shows the set-up of the Cross process directly connected to the Gray towers. You will note the vapor lines coming over from the bubble tower, and return line going to the condenser.

I hope that you and Mr. Slater will be able to go down to Barnsdall before long and look this installation over.

Very truly yours, The M. W. Kellogg Company, by Guy N. Harcourt."

Mr. Hale: Now I have three papers here which I will ask the reporter to mark "Plaintiff's Exhibits C-1, C-2, and C-3."

(Plaintiff's Exhibits C-1, C-2 and C-3 marked.)

X Q. Mr. Champlin, I will show you Plaintiff's Exhibit C-1, which purports to be a copy of a letter signed by you, and ask you if that is a copy of a letter which you wrote?

Mr. McKeever: We admit the identification, Mr. Hale, if that is one which was offered before. If the Court please, [fol. 150] we will not insist on him making those identifications of any that are in before.

The Court: All right. Put them in if they don't object.

Mr. Hale: Well, then, I will offer Plaintiff's Exhibits C-1, C-2 and C-3, and will read them.

The Court: Admitted.

Mr. Hale: (reading Plaintiff's C-1):

"Enid, Oklahoma, June 1st, 1927.

Mr. H. G. Atwater, Vice President Gasoline Products Company, Inc., 52 Broadway, New York.

DEAR SIR: I received a letter a few days ago from the Gray Processes Corporation of Newark, New Jersey, declaring that in their opinion we were infringing their patents. We replied soon after to the effect that in our opinion we were not doing so. A photostatic copy of both of these letters is enclosed for your information.

The writer deplores the seeming amount of litigation that our several companies are likely to be involved in, but we believe that we are right in the position we are taking and that no other course is open.

Yours very truly, H. H. Champlin, President."

Mr. Hale: These other two, gentlemen, appear to be enclosures in this letter of June 1st, 1927, which I have just read. The first is a letter on the letterhead of the Gray Processes Corporation, 961-975 Frelinghuysen Avenue, Newark, New Jersey, and reads as follows:

[fol. 151] "May 5th, 1927.

Champlin Refining Company, Enid, Oklahoma.

GENTLEMEN: We have a report from Dr. Mandelbaum concerning the vapor phase refining operations which you are carrying on and which has been the subject of previous correspondence between us.

Dr. Mandelbaum's report leaves no doubt that your operations constitute an infringement of Gray Patent No. 1,340,889 and we therefore again formally notify you of such infringement and call upon you to at once desist from the same and make good to us the profits and damages which have resulted from your infringement.

We are prepared to discuss a license arrangement with you in accordance with the terms of our standard license contract with others provided a satisfactory settlement for the past can be agreed upon.

Your very truly, The Gray Processes Corporation.
Thomas T. Gray, President."

Mr. Hale: And the other enclosure, dated May 21st, 1926, addressed to The Gray Processes Corporation, 961-975 Frelinghuysen Avenue, Newark, N. J., reads:

"GENTLEMEN: We have your letter of May 5th.

We cannot admit that we are infringing your patent.

We are not prepared to enter into negotiations with you for a license arrangement.

If you so desire we will give you a sworn statement of the amount of gasoline we have processed through our treating process.

[fol. 152] If you are still of the opinon that we are infringing your patent, we would urge that you file suit at once that the matter of infringement and damages, if any, be determined.

Very truly yours," —— ——.

The Witness: Who signed by?

Mr. Hale: That is signed by H. H. Champlin President. I do not think of anything else, for the moment. If we could have our recess now, and come back correspondingly early——

The Court: Well, all right. We will suspend until quarter before two, gentlemen.

Afternoon Session, Wednesday, April 24, 1929.

The Court came in at 2:00 p. m.

Cross-examination of H. H. Champlin by Mr. Hale resumed:

The Witness: If the Court please, in my testimony before the luncheon period I testified that the gasoline produced by the Jenkins plant was a merchantable product without further treatment. My superintendant has informed me now that only a portion of it is merchantable and another portion has to be treated.

The Court: The record will show the correction.

By Mr. Hale:

X Q. Didn't you know that in January, 1926, Mr. Champlin?

A. No, sir, I don't think I did. Mr. Marner had been trying to sell me that Jenkins plant and I don't recall that he ever said a thing different.

X Q. Mr. Who had?

A. Mr. Marner.

X Q. You don't recall whether any report had been made to you about that phase of the Jenkins plant or not, do you?

A. No.

X Q. So that you didn't know whether the Jenkins process would successfully handle recycled stock or not?

A. I don't know what you mean by that hardly.

Mr. Hale: I am not quite sure that I do.

[fol. 153] The Court: It is dangerous to use those phrases sometimes.

X Q. In other words, Mr. Champlin, whether it would properly crack the gas oil made in the process? You didn't know whether it would not not, did you? I guess you can answer "no."

A. I understand the Jenkins Process cracked gasoline and now that only a portion of it is merchantable and another portion has to be treated direct from the apparatus.

X Q. That was a genuine disadvantage in the Jenkins Process, wasn't it?

A. Oh, I don't know. It was all they could do evidently.

X Q. Well, I know, but from that point of view the Jenkins Process was less desirable on that account?

A. They were doing just that much more than any other process I had known of prior to the Gray Vapor Phase treating process.

X Q. But, Mr. Champlin, you were influenced considerably, weren't you, by the patent suit on the Jenkins Process?

A. No, I was not.

X Q. You weren't influenced by it?

A. No, sir, because all of these patent—these cracking processes are more or less in litigation.

X Q. Mr. Champlin, you recall that at the trial of this case a year ago, on page 126, I asked you, "And did the patent suit affect your opinion of the Jenkins Process?" and you said, "Yes." Was that answer incorrect, a year ago?

A. Well, it is hard to answer those things. It might have had its influence, but I didn't consider it seriously because all of the cracking processes, so far as I know, are involved in patent litigation.

X Q. I know, Mr. Champlin, but the answer which you made under oath a year ago was a perfectly honest answer, wasn't it?

A. Well, so far as I know. I wouldn't mislead the Court for anything if I knew it.

Q. You certainly weren't trying to mislead the Court when you said that the patent suit affected your opinion of [fol. 154] the Jenkins process?

A. Well, I wouldn't say now. I will just let it stand as it is. If I have testified adversely, why, I have done it really unwittingly and not knowingly.

X Q. When I said a year ago, Mr. Champlin, "The patent suit and the explosion"—referring to the Arkansas City explosion—"were very important factors in your mind, were they not?" you said, "Yes."

A. Well, the explosion was. I went up and saw that, and I didn't like it at all.

X Q. Now did Mr. Slater ever make to you any final report on the advantages—on the respective merits of these several cracking processes?

A. Well, only verbally. We discussed them from time to time.

X Q. Simply made verbal reports from time to time?

A. Yes.

X Q. He didn't make any one complete or final report?

A. No.

X Q. Really at the end it narrowed down in your mind to a choice between the Jenkins and the Cross, didn't it?

A. Well, sir, I will tell you, he would go and look at one plant, the Holmes-Manley, and Mr. Slater would come back to me and tell me, show me, that that was the best plant for us to install, and then he would go and look at a Cross Plant and he would come back and tell me he thought, may be, the Cross Plant was the best then, and he had been mistaken before. Then he would go and look at a Jenkins, and he would come back and report the same way.

X Q. Put it this way, Mr. Champlin, the Jenkins was the runner-up in this competition, wasn't it?

A. I don't know what you mean by runner-up.

X Q. Second best?

A. Well, considering price, I think so.

X Q. Now, Mr. Champlin, do you recall when you were talking there in the Oxford Hotel in Enid on February 6th

with Mr. Harvison and Mr. Keith present, any discussion about the Gray Vapor Phase Treater?

A. Oh, I don't recall any explicit conversation. I am quite sure that the Gray Treater was discussed. I can [fol. 155] only remember in a general way the attitude or the presumption we all come to.

X Q. Mr. Champlin, you are quite sure of this, are you not, that you didn't reach a final conclusion on this whole question until you had heard Mr. Schofield discuss the patent situation?

A. I reached a final conclusion the night of February—at the noon hour of February 26th when I told Mr. Harvison and Mr. Keith to go and prepare the contracts.

Mr. McKeever: Mr. Champlin, you got the date wrong.

The Witness: February 6th.

Mr. McKeever: You said the 26th.

The Witness: No, no, I didn't say the 26th, I don't think.

Mr. Hale: You said "26th," but you didn't mean it.

The Witness: I meant February 6th.

Mr. Hale: Mr. Reporter, will you read that previous question?

(Question read by Reporter.)

A. Well, I knew I hadn't decided to buy any plant until after that time.

X Q. That is, until you had heard Skofield's discussion of the patent situation?

A. Yes.

X Q. Mr. Champlin, did Mr. Koch ever make you a guaranted price for a Cross Cracking plant?

A. I couldn't say that he did make a guarantee. He told me what the material and labor would cost and what his engineering fee would be.

X Q. In other words, he was simply making to you an estimate, wasn't he?

A. Well, it was a price. You might term it an estimate.

X Q. Was he going to give you a guarantee of operations contract?

A. He said that he would give me precisely what the Gasoline Products Company would give me, and I pre-

[fol. 156] sumed that carried with it a guarantee license or guaranteed performance.

X Q. When he said that, did he know exactly what the Gasoline Products Company was going to give you?

A. Well, they had a general contract. I assume that he did because the Gasoline Products Company only had one contract that they were putting out at that time, they told me.

X Q. You assumed that he knew, but you don't know?

A. No, I don't.

X Q. Was Koch going to guarantee the price?

A. Well, I don't think we ever got that far into the negotiations. He said that the material and labor would be about $276,000, as I recall it; the engineering fee would be ten per cent more.

Mr. Hale: I think that is all, Mr. Champlin.

Redirect examination.

By Mr. McKeever:

Mr. McKeever: I ask the Reporter to mark the instrument I now hand him as Defendant's Exhibit No. 59.

(Document marked Defendant's Exhibit No. 59.)

Q. Mr. Champlin, I hand you the Defendant's Exhibit No. 59, and ask you where you got that letter?

A. Received it in the mail from Gray Processes Corporation.

Mr. McKeever: I now offer in evidence Defendant's Exhibit No. 59.

Q. I will ask you this, in connection with that exhibit, Mr. Champlin: Upon cross-examination you said Mr. Gray had sent you letters that his process could be used in connection with others than the Cross. Now is this one of the letters?

A. Yes.

Mr. McKeever: I now desire to read it to the jury. It is on the letterhead of The Gray Processes Corporation, Newark, New Jersey. (Reading):

[fol. 157] January 20, 1926.

Mr. H. H. Champlin, Pres., Champlin Refining Co., Enid, Oklahoma.

DEAR MR. CHAMPLIN: We understand that you are contemplating the installation of some cracking units in your refinery but that you have not finally decided as to what system you expect to adopt. As you know, our system is at the present time working on Cross units, at Barnsdall and also at the Marcus Hook plant of the Sun Oil Co., but we are putting in 9 units for the Marland Refining Co. to operate in direct connection with the Dubbs process.

We own the basic patent for the treatment of cracked gasoline in the vapor phase in contact with fuller's earth or other catalytic agent. We understand that someone in the West has been quoting on towers to be used in connection with Cross units, the operation of which would infringe our patent. These people are offering equipment of this character at a very high cost.

We are prepared to furnish a license for the use of our process in direct connection with the Tank & Tube process, Cross Patent, Dubbs Process and Jenkins Process. Mr. Walter Miller of the Marland Refining Co. has recently made a very careful survey of all treating processes including, I believe, a process which has recently been offered you and has taken a license to operate under our patents. I believe he would be very happy to impart to you the result of his investigation.

I have often heard my brother A. McD. Gray speak of you and your company and I hope I may sometime in the near future have the pleasure of meeting and knowing you personally.

With best wishes,

Very truly yours, The Gray Processes Corporation,
Thomas T. Gray, President.

[fol. 158] Q. Mr. Champlin, Mr. Hale asked you whether or not the contents, of what is termed the Keith letter of February the sixth was correct, and as I understood you to testify this morning on direct examination, that there was some difference between the letter and the conversation that you had had with Gray and Harvison with reference to the capacity——

Mr. Hale: Just a minute: In the first place I did not ask him if the letter was correct. My recollection is that I asked him if it was in accordance with the oral conversations and his reply was yes.

The Court: You asked him, as I remember it, if it was in accordance with the previous offer.

Mr. McKeever: I stand corrected on really what was said.

Q. Now, I am asking you, you made the statement, as I understood, that you had testified that your previous negotiations did show a discrepancy and you answered Mr. Hale that there was no discrepancy?

A. Well, when Mr. Hale asked me that question this morning I didn't think of this error. The proposal uses the singular "tower."

Q. You mean the written letter?

A. Yes; the written letter used the singular word "tower," and I said, and still say, that it should have been "towers"; towers of sufficient capacity to treat the entire output produced by this Cross cracking plant.

Q. You say that, when you were discussing it with them?

A. Yes.

Q. Now, I believe also he asked you if you had an acid treating plant in January, 1926, and you answered that you had an acid treating plant for your straight-run gasoline. Did you have any acid treating plant or any other kind of a treating plant to treat cracked gasoline that would come from the Cross stills?

A. No.

Q. So that when the Cross stills were ready for operation there was no equipment about your refinery that could be [fol. 159] used to further treat the unfinished gasoline from the Cross stills?

A. No; nothing available.

Q. Mr. Hale asked you if the contracts when presented to you on the evening of February the sixth were in printed or typewritten form, and you answered that they were?

The Court: He said some of them were.

A. I said some of them were. I am sure some of them were. They might all have been; I couldn't say.

By Mr. McKeever:

Q. I call your attention to that to ask you another question only. Was anything said by Keith or Harvison, either or both, with reference to whether or not the contract in its terms were like any other contract they made?

A. They were to be exactly like the contracts that they had been selling other refineries; like they had recently sold to the Marland people; and Mr. Harvison at that noon hour exhibited to me the Marland contract, but I didn't get to read that. He did that to show me that he was doing for us just exactly what they had done for other refineries.

Q. Mr. Champlin, in the construction of the cracking units or other equipment in the refinery, with reference to Mr. Koch's proposition, was it in that case discussed that he was to furnish you the material?

A. Well, I understood that he was to buy the material and ship it to us, and he would do the engineering.

Q. Now, the purpose of my question is by reason of the question asked by Mr. Hale, indicating Koch's inability to furnish you material. Those materials,—how were they shipped? Who pays for them?

Mr. Hale: I do not think I indicated anything like that.

Mr. McKeever: Then I will withdraw it. I thought you did.

Q. Mr. Hale asked you with reference to the Jenkins process being involved in patent litigation, and you replied to him that those processes were all engaged in litigation at that time. Will you amplify that answer further and tell [fol. 160] about what the litigation was?

A. Just common information that the Standard Oil of Indiana was in suit with the Dubbs process, and that they were all in litigation, and the very purpose of the organization of the Gasoline Products Company was to bring together a number of patents that were more or less antagonistic one with the other. It was a sort of pool or combination of owners of patents to bring together these patents so that they could all agree and market the processes.

Q. Now, those patents are set out in detail in your contract, aren't they, for your protection?

A. Yes. It says the patents are owned by the Standard Oil Company of Indiana, Standard Oil Company of New

Jersey, Standard Development Company, the Texas Company, and by Dr. Cross, and possibly others. This Gasoline Products Company is involved in litigation over its patents.

Mr. McKeever: I am calling attention at this time, if the Court please, that this Exhibit A attached to their declaration has not been read to the jury.

The Court: It is not necessary to read the whole of it.

Mr. McKeever: No; and I do not want to do that; only in connection, they brought up this patent litigation. Mr. Champlin has mentioned these different companies, and I would like at this time now to read from the evidence adduced by the plaintiff which has not been read from the exhibit in connection——

The Court: You are now re-examining, on the redirect examination. I think you had better postpone that until later, in your argument, or other evidence.

Mr. McKeever: Perhaps so; but I think I could perhaps make it—Well, I will then. I will do that. I will ask him another question.

Q. I will ask you, Mr. Champlin, if you knew of any suits pending against these various patents in which the Government was a party?

A. Yes. I don't think they were contesting the patents; but they were contesting the validity of the combination. [fol. 161] The Government was prosecuting the Gasoline Products Company for being an illegal corporation in violation of the Sherman anti-trust law.

Q. The record of that case had been furnished you, hadn't it, or has since?

A. I knew of it. I never have had any record that I knew of, if I know what you mean by record.

Mr. McKeever: I would like to ask leave of Court, on looking among my files, the privilege of identifying and offering another letter that I myself overlooked in so many exhibits. I now hand the reporter another instrument which I desire to have identified as "Defendant's Exhibit No. 60."

(Paper marked "Defendant's Exhibit No. 60.")

Q. Now, Mr. Champlin, I hand you "Defendant's Exhibit No. 60" and ask you if that was received by your

company,—that letter from the Gasoline Products Company?

A. Yes.

Mr. McKeever: I now hand this letter to counsel for their examination, and I offer it in evidence, if the Court please.

(Hands paper to counsel for plaintiff for examination.)

Mr. Hale: If Your Honor please, we shall object to this letter. It is dated March ninth, 1923, and it relates to a type of process which, as I understand it, is quite distinct from anything which is in suit here. And of course, written practically three years before anything that is under discussion particularly in this case.

The Court: Whom is it from?

Mr. Hale: From the Gasoline Products Company.

Mr. McKeever: It is the first negotiations of that company with us to sell us a process of some kind.

Mr. Hale: Yes, but not of this kind.

Mr. Marsh: We think it is absolutely immaterial——

The Court: What is the purpose of the offer?

Mr. McKeever: The purpose is, I take it,—that it has this purpose: I haven't discussed this particular part of it with the Court yet, but all through this case I understand that there is the question, when it came to the measure of [fol. 162] damages, what was within the contemplation of the parties; and for that reason I offer it, and——

The Court: The contemplation of the parties three years before?

Mr. McKeever: Yes. From the time they start until they quit. It is all through it. I am not trying to prove it is the same unit. I am trying to prove that the Gasoline Products Company, in negotiating with the Champlin Refining Company, had the contemplation at all times of the profits that could be made out of one of the cracking plants.

(Court and counsel confer at bench.)

The Court: From my point of view that is too remote. I will rule it out now and read that letter over at some time at my leisure. I make the ruling now that it is too remote and not connectel to the issue you refer to.

Mr. McKeever: All right. We accept that.

The Court: And if I change my mind I will let you know.

Mr. McKeever: I don't really attach so great an importance to it, but at the same time I had that in my file and wanted to offer it. That is all for this witness.

Recross-examination.

(Mr. Hale:)

X Q. Now, Mr. Champlin, if I understand your testimony this afternoon, it is that this letter of February sixth is a quite incorrect memorandum of the previous oral offer. Is that right?

A. It is only incorrect in that one little word "towers." It should have been plural instead of singular. If there are any other inaccuracies in it I don't recall them.

X Q. That is the only inaccuracy you know about, then?

A. That is all that I recall.

X Q. You think the difference between one tower and three towers is a trifling difference?

A. Well, one tower was never contemplated. It was con- [fol. 163] templated that two towers would take care of our output, but it would be necessary or desirable to put in three to provide against a shutdown period on one.

X Q. Then when this letter says "covering the installation of a Cross vapor phase system treating tower" that is flagrantly wrong, isn't it?

Mr. McKeever: I object to the term "flagrantly."

The Court: Well, that is a characterization each party might make. I don't think that is very important, the use of the word as characterization, in that sense.

X Q. There isn't any doubt about that, is there?

A. That is my understanding at the time. That I was to have a system that would completely process the gasoline that was produced there through that cracking plant.

X Q. Did you read that letter when you got it?

A. What?

X Q. Did you read that letter when you got it?

A. Yes. I did.

X Q. Did you immediately protest that the language of the first paragraph was wrong?

A. No. I didn't. I wasn't looking for any trouble from that source.

X Q. Wait a minute. Answer my question. Your counsel can bring those things out, if he wants to. Answer my question, please. You didn't complain about the language of the first paragraph to any body?

A. No. I didn't notice but what it was in exact conformity with what we had previously discussed and agreed upon.

X Q. You never noticed?

A. No. At that time I thought——

X Q. Just a minute. I don't think you have any occasion to make these speeches.

The Court: Your counsel will ask you about that.

X Q. Mr. Champlin, would it have been possible for you to treat, by your acid treater, the cracked gasoline from your Cross cracking plant?

[fol. 164] Mr. McKeever: I object to that for the reason that it calls for a highly technical answer that the witness may not be qualified to give.

The Court: Then all he can do is to say that he doesn't know.

A. Well, I'll say no, because I discussed the matter with our superintendent at the time. That is, in the fall of 1926.

X Q Is that because it was the wrong type of apparatus or because you were using the apparatus for some other purpose?

A. Because we were using it for other purposes. We didn't have the capacity to re-run through the shell stills.

X Q. Mr. Champlin, when you talked with Koch early in 1926 did you know whether he had ever built one of these Cross cracking units?

A. He had said he had erected one for DeGandahl in England. That was my understanding.

X Q. You didn't know of his ever erecting any other?

A. No.

X Q. Was anything said about the time of payment of this Koch unit if you should have one. I mean if you should have a Cross unit installed by Koch?

A. No, I don't think so.

X Q. Or about the terms of payment?

A. No. I don't recall

X Q. Or about any of the details of the contract?

A. I don't recall that.

XQ. You never got, with Koch, beyond the point of merely listening to a salesman's talk, did you?

A. Yes, I did. I even went so far as to ask Mr. Keith about this and if Koch had a right to sell the process, and Mr. Keith told me that undoubtedly he did.

The Court: I don't think that last part is responsive.

Mr. Hale: May we have that part stricken out?

The Court: Yes.

Mr. McKeever: Now what part does he want stricken out?

[fol. 165] The Court: Where he spoke about what Keith said; that part there should be stricken out.

Mr. Hale: That's all hearsay.

The Court: That part may be stricken out.

Redirect examination.

(Mr. McKeever:)

Q. Mr. Champlin, Mr. Hale has asked you whether or not it was a fact, in substance, I may not quote his question exactly,—that your negotiations with Koch proceeded no further than merely salesman's talk. Now, I will ask you if you did go further in regard to the investigation of Koch's proposition, and what you did?

A. Our office records all burned up, and Koch may have furnished me a contract. I don't recall. He may have furnished me estimates. I don't recall. But I remember—all I remember was he did try to sell me that plant and that I investigated and convinced myself that he had authority to sell it.

Q. All right. Now, how did you investigate that, and how did you have that gone into?

A. I asked Mr. Keith and Mr. Keith told me that undoubtedly——

Mr. Hale: I object. Hearsay.

The Court: No. He said he satisfied himself. I don't think he can put in the conversation that he had with Mr. Keith on that question of authority.

Mr. McKeever: All right.

Q. Now, I will ask you this question; from all you could learn did you believe at that time that Mr. Koch had authority to sell the plant?

A. Yes.

Mr. McKeever: If Your Honor please, that is all with this witness.

(Witness excused.)

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[fol. 166] R. MITCHELL, called for the defendant, testified:

Direct examination.

By Mr. McKeever:

Q. Mr. Mitchell, you were sworn yesterday as a witness, weren't you?

A. Yes, sir.

Q. Will you state your name?

A. R. Mitchell.

Q. Where do you live?

A. Kansas City, Missouri.

Q. In what business are you engaged?

A. I am in the employ of Albert R. Jones and E. G. Doble, whom you might call capitalists.

Q. In connection with what kind of business?

A. Mostly oil producing and all oil refining. Some real estate.

Q. Are you connected with a refining plant?

A. Yes, sir.

Q. Where is it located?

A. In Kansas City, Kansas.

Q. Have you ever been employed by the Cross Engineering Company?

A. Yes, sir.

Q. When?

A. I was employed in March, 1926, and worked for the Cross Engineering Company.

Q. What time in March did you go to work for them?

A. As I recall it, it was March 15th.

Q. How long did your employment—over what period did it last?

A. Until the Cross Engineering Company was sold out to the M. W. Kellogg Company during the summer of 1926.

Q. Do you recollect when the Cross Engineering Company was sold to the M. W. Kellogg Company? The date of that?

A. No, I do not.

Q. As near as you can give it?

A. I would say in June, 1926. I am not positive of that.

Mr. McKeever: Now have you all the exhibits, Mr. Clerk? I want to refer to one exhibit for the purpose of a date, if Your Honor please. (Exhibits examined by Mr. McKeever.) It is an original letter. (Examining.) I have it in my mind. (Previous questions and answers read.)

Q. Are you acquainted with P. C. Keith, Jr.?

A. Yes, sir.

[fol. 167] Q. Was he connected with the Cross Engineering Company when you went to its employ?

A. Yes, sir. Mr. Keith was vice-president of the Cross Engineering Company at that time.

Q. Who was the directing officer of that company? Who directed the activities then?

A. Well, I would say Mr. Keith.

Q. When you went to that company did you learn of any transaction that was going on with the Champlin Refining Company?

A. Well, I heard of it; yes, sir.

Q. Through whom?

A. I believe through Mr. Keith.

Q. Under whose direction was your work done there?

A. Mr. Keith's.

Q. And what kind of work were you doing?

A. I had charge of its designing and making estimates.

Q. Did you have a designation as to your employment there, were you engineer or what?

A. Yes, I believe I had the title of chief engineer.

Q. Did you start to or did you design or make a drawing, whether you designed it or not, or do anything in connection with the drawing or designing of a vapor phase treating tower for the Champlin Refining Company of Enid, Oklahoma, while you were in the employ of the Cross Engineering Company?

A. Yes, sir.

Q. At whose direction did you do that work?

A. At the immediate direction of Mr. Keith.

Q. Did you have any direction or conversation with Mr. Keith—— I will ask you this: How soon after you were employed by the Cross Engineering Company did you have a conversation, if you had one, with Mr. Keith about the Champlin job?

A. Oh, I would say within—I am not positive of that date, but I would say within two weeks.

Q. Will you tell the jury in substance what your first conversation with relation to the Champlin Refining Company work, what it was?

[fol. 168] Mr. Hale: Just a minute.

The Court: It seems to me if you want to prove any statements of fact that Mr. Keith knows about, you can call him and not call a witness who states what Mr. Keith told him.

Mr. McKeever: Of course he is here for the other people. I don't know what Keith will testify to.

The Court: Wait until he testifies and then contradict him if you don't think it is true. You can't get at it this way in advance.

Mr. McKeever: Well, all right. I will ask him the talk if they put him on.

Q. Now Mr. Mitchell, what did you do with reference to drafting a vapor phase treating system tower or towers for the Champlin Refining Company?

Mr. Hale: I don't know, your Honor please, as there is any objection in the world in showing that he drafted, made drawings or anything of that sort. Whether he has a right to characterize them as being for so and so.

The Court: I suppose he means they were supposed to be so and so. Is that what you mean? They were supposed to be for the Champlin Refining Company?

A. Yes, sir.

Q. What did you do in that connection?

A. Why, I drew up some vapor phase towers.

Q. Under whose direction?

A. Under Mr. Keith's direction.

Q. What did you do with those drawings?

A. They were turned over to the Champlin Refining Company.

Q. Do you know when you—I will withdraw that. Did you ever go to Enid, Oklahoma, during the time you were employed by the Cross Engineering Company?

A. Yes, sir; I went there, Oh, possibly four times.

Q. Did you ever go there in company with Mr. Keith?

A. Once that I recall.

[fol. 169] Q. What kind of towers did you design, I mean make the drafting for?

A. What kind of towers?

Q. Yes.

A. Well, they were the simplest towers we could figure out. They were very similar to other vapor phase towers.

Q. Had you prior to that time had any experience on making drawings for towers—vapor phase towers?

A. No, sir. No, sir; I never had.

Q. I will ask you if the towers—the drawings which you made of these towers—that you say you left at Enid with the Champlin Refining Company were any different from the Gray towers, from the design of those?

A. I don't think that they were. That is, they were substantially like the Gray towers.

Q. Do you remember when you were down there what the date was when you took those towers down—those drawings?

A. The latter part of June, as I recall.

Q. Do you remember the circumstance of having wired him that you were coming?

A. Yes, sir.

Q. That wire is in the evidence and it can be substantiated. I don't want to bother to hunt it out. If that wire is dated June the 10th, 1926, would that fix in your mind about the time in June it was?

A. June 6th, you say?

Q. Was that June or July?

Mr. Glasser: July.

Q. I might have to refresh my mind. I thought it was June. We will get that. Well, you wrote a letter also about your coming to Enid, didn't you? That is also in evidence.

A. Yes, I recall having heard that read this morning or yesterday.

Mr. Hale, that letter is in June. The telegram in July, wasn't it? The letter is June 22nd—the telegram July 10th. They are in evidence. Now Mr. Mitchell, do those fix in your mind, assuming those are the correct dates and [fol. 170] I am sure they are now, the visits you made to the Champlin plant?

A. Yes, yes.

Q. The last visit you made was the one after you sent the telegram of July the 10th which has been offered in evidence which states "Leaving Sunday or Monday with data on treating plant." Now you took the drawings down there on that visit, didn't you?

A. Yes.

Q. Was that the last visit you made there?

A. No, I think—no, I am sure it wasn't. I went down later with some preliminary plans and an estimate for a compounding plant which the Champlin Refining Company were contemplating at that time.

Q. That didn't have anything to do with the treating plant?

A. No, sir.

Q. All right. This was the last time you were there that had anything to do with the treating plant then, in July?

A. As I recall it.

Q. How did you come to go to Enid on those occasions?

A. Well on the occasions——

Q. With reference to this Champlin treating tower?

A. To discuss with Mr. Champlin and Mr. Slater the details of the towers and to induce him to use this or some other treating system such as the Sims Oil Company was using at Dallas.

Q. Now under whose direction did you go to Enid?

A. Mr. Keith's.

Q. That P. C. Keith, Jr.?

A. Yes, sir.

Q. You say to induce Mr. Champlin to use some other tower instead of what tower?

A. Well, not—well, it wasn't so much a tower, I don't believe, as a liquid phase treating plant at Dallas.

Q. Now you say to use that instead of what?

A. Instead of the copperized clay tower.

Q. Was the copperized clay tower what is known as the Cross vapor phase treating tower?

A. I believe so.

Q. Is that a fact?

[fol. 171] Mr. Hale: Just a minute.

Q. I mean do you know whether it is or not? I will ask you if you know as an engineer working for the Cross Engineering Company that the Cross vapor phase system treating tower was the copperized tower?

A. As I understand it, yes.

Q. Did you have any conversation before you went to Enid with Dr. Cross and Mr. Keith with reference to your going down there?

A. Yes. Mr. Keith——

Mr. Hale: Just a moment. That answers the question.

The Court: He said he did.

Q. What was that conversation?

Mr. Hale: That I object to.

The Court: I will have to sustain the objection. So far as I can see, I cannot see that that is admissable.

Mr. McKeever: Of course, I am offering that on the ground—should I state it in the presence of the jury?—on the ground that Mr. Keith is acting for the Gasoline Products Company in furnishing us whatever he furnished us in the way of treaters. Whatever activity he did, he was acting in behalf of the Gasoline Products Company, and any statement or direction he gave in connection with it, would be, even though against his interest, competent and material.

The Court: I don't see how bare statements of other people, some of whom are present in court and haven't testified, would be admissable, unless you want to contradict them.

Mr. McKeever: Let me withdraw that one and ask it in a different form.

Q. Did you accompany Mr. Keith at any time while you were in their employ to the office of Dr. Cross?

A. Yes; yes, several times.

Q. Did you ever go with him on an occasion that had to do with the furnishing of the Vapor Phase System treating tower to the Champlin Refining Company?

A. As I recall it, yes.

[fol. 172] Q. At whose direction did you go there or invitation? You can call it direction or invitation?

A. Well, I believe, at Mr. Keith's invitation.

Q. Now did you receive any instructions at that meeting of what you should do with reference to the Vapor Phase System treating towers that were being under discussion with reference to furnishing them to the Champlin Refining Company?

Mr. Hale: I think I will object to that as a leading question.

The Court: He asked him if he received any directions.

Mr. Hale: Then he went on and stipulated just what sort of directions they were.

The Court: As to certain things. I think that is admissible. Did you or did you not?

Mr. McKeever: Say yes or no, whether you received any directions there at that meeting.

A. I would call them suggestions.

Q. All right, suggestions. What were they?

Mr. Hale: That I object to.

The Court: I can't understand the admissibility of this. I mean I can't understand the theory upon which it can be admissible. What do you want to prove?

Mr. McKeever: Well, I want to prove and can prove that this witness was called in there and was sent to Enid with the direction that he go there and attempt to get Mr. Champlin's mind off this Vapor Phase treater with the copper in it and put him in, instead, either the Liquid Phase treater that Dr. Cross was the inventor of down at the Sims Oil Company in Dallas, or the Gray.

The Court: Mr. Champlin has already said that in substance, said they tried to get him to take another kind altogether.

Mr. McKeever: Yes. Now, then, the probity of this, if that is the proper word, is that here is the agent who sold [fol. 173] it to us, and the agent of the Gasoline Products

Company and the man that is acting for them is directing the activities to get Champlin off that Vapor Phase treater and it goes to the question of the proof of whether or not they considered Champlin had accepted their treater.

The Court: What bearing has that on that question?

Mr. McKeever: It just simply is evidence of the contract that they made for the treater, that is all. If it has no bearing as evidence of the contract for this vapor phase treater copperized, then it has no place in my testimony. That is what I am offering it for, Judge, to show additional proof of the contract that the Gasoline Products Company entered into with Champlin to give him this Vapor Phase treater copperized royalty-free.

The Court: You want to show that Cross or the Engineering Company of which he was Chief Engineer directed him to go down to Enid and try to get Mr. Champlin to take another kind of process?

Mr. McKeever: I want to show that Keith directed him there too as Vice President of the Cross Engineering Company, who wrote that letter, and also as agent of the Gasoline Products Company directing him.

The Court: All right. Ask him if Keith as an officer of that corporation or Dr. Cross, President, asked him to go down or suggested for him to go down and try to induce Mr. Champlin to take another kind of machine. But I understand it has already appeared in evidence that he did.

Mr. McKeever: I think in a way it has.

By the Court:

Q. Is that the fact?
A. Yes, your Honor.

The Court: He says it is the fact.

By Mr. McKeever:

Q. Mr. Mitchell, you did go to Enid then, did you?
A. Yes, sir.
Q. Did Keith go with you?
A. He did on one occasion that I recall.

[fol. 174] Q. Was the purpose the same purpose as to Enid when he went with you?

A. Yes, as I recall it.

Mr. Hale: Just a moment.

The Court: He may answer. That is in line with what he said before. (To witness.) You both went there for the same purpose, to get him to take another kind of machine, didn't you?

A. Yes.

By Mr. McKeever:

Q. Did the Cross interests, I don't know whether the Engineering Company or the Development Company,—was there a form of treater called the Cross Liquid Phase treater? Was there such a thing?

A. Yes, I should think you would call it a Cross Liquid Phase treater. There was such a plant that I would call that at the Sims Oil Company at Dallas, Texas. I don't know whether it was called, actually called, the Cross Liquid Phase treating plant or not, but it was designed by Dr. Roy Cross, I believe.

Q. What was its purpose?

A. Its purpose was to treat cracked gasoline. I believe they used it for cracked gasoline, yes.

Cross-examination.

By Mr. Hale:

X Q. Mr. Mitchell, why did you leave the employ of the Cross Engineering Company?

A. I went with the M. W. Kellogg Company at that time.

Mr. McKeever: Wait just a minute.

Mr. Hale: You may strike out that question and answer, Mr. Richardson (the Reporter).

X Q. Were you employed by the M. W. Kellogg Company?

The Court: You want that former question and answer to stand?

Mr. Hale: Yes, I will put those back in the record.

A. Yes, sir.

X Q. How long were you employed by them?

A. Until the fall of 1927.

[fol. 175] X Q. Why did you leave the Kellogg Company, Mr. Mitchell?

A. On account of my health and at the invitation of Mr. P. C. Keith, who suggested that I leave. I had bad health and he thought it would be better that I leave.

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E. J. SLATER, called for the Defendant, having been first duly sworn, testified as follows:

Direct examination.

By Mr. McKeever:

The Clerk: You were sworn yesterday?
The Witness: Yes, sir.

Q. Will you state your name?
A. E. J. Slater.
Q. Where do you reside?
A. Enid, Oklahoma.
Q. With what company are you employed?
A. Champlin Refining Company.
Q. In what capacity?
A. Refinery Superintendent.
Q. How long have you been such superintendent, Mr. Slater?
A. Since March 1st, 1928.
Q. Who was superintendent prior to that and including the year of 1925 and '26?
A. My brother, P. E. Slater.
Q. Is he in the employ of the company any more?
A. No.
Q. Were you connected with the refinery in 1925 and 1926, with the Champlin Refinery?
A. Yes, sir.
Q. While your brother was there?
A. Yes, sir.
Q. In what capacity?
A. As Assistant Superintendent.
Q. How long had you been there in that capacity?
A. Three years.
Q. Three years prior to the time your brother left, you mean?
A. Yes, sir.

Q. Where were you employed and in what capacity prior to going to the Champlin Refining Company?

A. I was with the Southern Refining Company at Somerset, Texas.

Q. In what capacity?

A. Superintendent.

Q. How long?

A. A year and a half, about.

[fol. 176] Q. And prior to that what company were you connected with?

A. With the Texas Mexican Oil & Refining Company at Laredo, Texas.

Q. In what capacity?

A. As superintendent.

Q. Of the refinery?

A. Yes, sir.

Q. How long did you have that job?

A. Three years.

Q. And what was your experience prior to that position?

A. I was superintendent of the Pierce Oil Corporation Refinery at Sand Springs, Oklahoma.

Q. And how long were you in that position?

A. Three years.

Q. And what experience prior to that? That was a refining plant? All these were refining plants?

A. All of them are refineries; yes, sir.

Q. Prior to that what experience had you had?

A. I was with the Indian Refining Company, superintendent of lubricating and paraffin department at Lawrenceville, Illinois, refinery.

Q. And for how long?

A. Two years.

Q. And what was your experience prior to that?

A. I was with the Prudential Oil Corporation at Baltimore, Maryland.

Q. How long?

A. Three years.

Q. Was that a refining plant?

A. Yes.

Q. In what capacity?

A. I went up there to build a lubricating plant and wax plant for them, and later operate it.

Q. You mean the superintending of the building of it?

A. Yes, sir.

Q. Did you do that?

A. Yes, sir.

Q. And then operated it?

A. Yes, sir.

Q. Prior to that what experience had you?

A. I was with the Magnolia Petroleum Company of Beaumont, Texas.

Q. In what capacity?

A. In charge of the paraffin and lube plant.

Q. "Lube" is an abbreviation of Lubricating oil?

A. Yes.

[fol. 177] Q. How long in that plant?

A. Two years.

Q. And had you any experience prior to the Beaumont, Texas, experience, with the Magnolia?

A. No.

Q. I mean in connection——

A. Refinery experience?

Q. Yes?

A. Oh, yes; I was with the Indian Refinery Company at Georgetown, Kentucky, for seven years.

Q. Prior to going to Beaumont?

A. Yes.

Q. In what capacity?

A. I went there first as wax plant engineer, and was later made superintendent of the wax plant and their lubricating departments.

Q. How many years experience have you actually had in refining of petroleum and the by-products that is usually handled through a refinery?

A. Twenty-three years, or twenty-four.

Q. I would like to have you, Mr. Slater, tell the jury, prior to the installation of the Cross cracking units that have been testified to, in the Champlin plant what kind of a plant you had down there?

A. Well, they had what they call a skimming plant.

Q. Make it brief as you can, because we are not going into it in detail, but enough for the jury to understand what that means?

A. The skimming plant is where you take the crude to what we call shell stills and take off the gasoline, kerosene,

gas oil and the fuel oil, and in connection with that, in 1922, they put up a lubricating plant, but the lubricating plant wasn't sufficiently large enough to take all of the lubricating values out of the crude, so you couldn't call it a complete plant.

Q. Prior to the cracking plant it was generally termed among the oil folks and everybody else as a skimming plant?

A. Yes; a skimming plant.

Q. In the skimming plant you take off a certain kind of gasoline from the original crude oil as it comes from the field?

A. Yes.

[fol. 178] Q. And that leaves a residue there? What do you call that residue?

A. A fuel oil.

Q. What do you call the charging stock for the cracking plant?

A. Gas oil.

Q. What is the difference between that and the residue from the skimming plant?

A. The gas oil is taken off overhead and is passed over in a vapor form and is liquified and condensed back into a liquid.

Q. Then you get from the skimming plant your charging stock for your cracking plant, do you?

A. Yes, sir.

Q. And some fuel oil too?

A. Yes.

Q. Do you remember the circumstance of the Gasoline Products Company negotiating with Mr. Champlin to install these cracking units in his refinery?

A. Yes, sir.

Q. Were you actively engaged in assisting the operation of the refinery at that time?

A. Yes, sir.

Q. Are you acquainted with Mr. P. C. Keith, Jr.?

A. Yes, sir.

Q. Did he at various times during the negotiations visit your plant?

A. Yes, sir.

Q. The Champlin Company did purchase the cracking units?

A. Yes, sir.

Q. How many units?

A. Two 2,000 barrel units.

Q. What do you mean by 2,000 barrel?

A. That is charging stock.

Q. Two thousand barrels a day?

A. No; that would be 2,000 barrels a day for each unit.

Q. That would make a capacity that they could run through that plant 4,000 barrels a day of charging stock?

A. Yes, sir.

Q. Now, after that is run through the Cross cracking units or the stills, or whatever you call them, what do you get?

A. You get what we call a pressure distillate.

Q. Has it got any other name that has been termed here?

A. It is termed a synthetic crude or an unfinished gasoline.

[fol. 179] Q. Let's not get those terms confused. The pressure distillate or the synthetic crude and the unfinished gasoline mean to you all the same thing?

A. That is to me, yes.

Q. And the more proper term to be used for the product that comes from the cracking units is unfinished gasoline?

A. That is right.

Q. Will you hereafter refer to it as unfinished gasoline, so that we will not get confused?

A. Yes.

Q. Besides the unfinished gasoline do you get any residue?

A. Yes; you get what we call a recycled stock and heavy fuel oil.

Q. What do you mean by the recycled stock?

A. The recycled stock is the heavy ends of the vapors that are carried down at the bottom of the bubble tower and they are recycled back through the unit again.

Q. This whole process is carried on through a high temperature; heat?

A. Yes.

Q. And a vaporization?

A. Yes.

Q. So that what you mean by heavier ends, they are heavier substances in the product when you break it up

by heat that naturally gravitates to one place, and the lighter ends go into a vapor and go up to another place?

A. Yes, sir.

Q. And that is the way you separate them?

A. Yes.

Q. After you have gotten from these cracking units this product that is composed of what you call the lighter ends, which you say is an unfinished gasoline, do you have to do anything further with that?

A. Yes; it has to be clarified and what we call sweetened.

Q. You have heard that term here, "sweet to the doctor test"? Is that what you mean by sweetening it, or what they mean?

A. Yes.

Q. Why do you have to do that?

A. Well, the gasoline as it comes from the cracking unit has a great deal of impurities in it,—gum and sulphur compounds. It is an undesirable product for use in any internal [fol. 180] combustion engine as it is before it is clarified and sweetened and the sulphur compounds taken out.

Q. The color too has something to do with it, doesn't it?

A. Oh, yes.

Q. What about the color after you get through with it from the cracking stills?

A. You have what we call on our Cross units about a 17 color.

Q. Do not use that kind of terms. We don't know anything about that. Is it muddy colored?

A. Yellow.

Q. To get this gum and sulphur content out of that, how do you get that out and get the color looking good?

A. There are two processes by which that can be done. One is by vapor phase system and the other by acid treating and rerunning.

Q. The vapor phase system, as has been testified to and the jury now know, is the same thing as the Gray process, or the Cross process if they had one? That is what you refer to as the vapor system?

A. Yes.

Q. Vapor phase?

A. Yes. There is only one distinction between them. The Cross vapor phase filter tower was to use decopperized

clay which would make a finished product as it came from the filters. In the Gray process it was necessary to further treat it in order to sweeten the gasoline.

Q. If you do not use the vapor phase system of treatment to deodorize and clarify the unfinished gasoline, what do you have to use?

A. Then you have to use acid and caustic soda, and litharge.

Q. What is the difference between that and what we have been talking about here as the chlorine treatment?

A. Well, litharge, that is what we call the doctor solution for sweetening the gasoline.

Q. After the chlorine treatment?

A. Yes. With the doctor treatment or litharge treatment you use 16 strong caustic soda, and you let this caustic soda take up as much litharge as it will.

[fol. 181] Q. Besides the vapor phase system treating towers to clarify and deo-orize you said a while ago you only had one other system and that was acid, and are there different acids that you use? Is that what comprises the chlorine treatment?

A. No.

Q. Then you have got two or three ways of doing that with acids?

A. Yes.

Q. One acid way is the litharge?

A. That is not an acid. The acid is used to take the impurities out, and for the color. That is where the acid is used.

Q. Is that the chlorine treatment?

A. No.

Q. I am only just following you. You said you had two ways of clarifying this product; one of them was the vapor phase treater and the other was by acids?

A. Yes.

Q. Now, what I am trying to get at, I want you to explain to the jury what this chlorine treatment is?

A. Well, in the vapor phase treating process,—in our process where we haven't decopperized clay, then you have to use what we call a doctor solution for sweetening the gasoline or use a chlorine solution. The chlorine solution is made up of water, dehydrated lime and chlorine gas. The

doctor solution is made up of caustic soda and litharge. Now, either one of them two processes would sweeten the gasoline; but we selected the chlorine process because we found it was cheaper.

Q. When did your refinery get the Cross cracking units installed ready for business?

A. In September, 1926.

Q. When did they commence construction on them? Approximately?

A. In March, 1926. The latter part of March.

Q. During the construction of the cracking units,—that was done by Kellogg & Company, wasn't it?

A. Yes.

Q. Their construction organization. During that time was any treaters put—or built in conjunction with it?

A. No.

Q. At the time you started the construction of the Cross cracking units did you have any machinery constructed [fol. 182] there by means of which you would treat unfinished gasoline?

A. No. We had a process there—the chlorine gas solution—that we used for sweetening straight run gasoline. But we had nothing there that we could use to treat the cracked gasoline with acid, nor any vapor phase process.

Q. If it had been necessary—as you said it was—to give it some treatment after it had been cracked, what would have been necessary for you to do to equip yourself for further treating the cracked gasoline?

A. Well, we would either have had to have went ahead and put in the vapor phase filter towers, as we did, or we would have had to put in an acid treating process for cracked gas, and in addition to that acid treating process we would have to provide shell stills—low pressure stills—and equip them with fractionating towers to fracti-nate the gas after we re-run it. What I mean by fractionating; after we take it through a fractionating tower you can get your tests and the specifications that it is necessary to run it to. And, in fact, it is necessary to have a fractionating tower before you can get any satisfactory results.

Q. Now would it have been necessary—using the vapor phase system the other equipment you have mentioned wouldn't be necessary then?

A. No.

Q. So your refinery, you say, wasn't provided with any way except what machinery you had to treat the unfinished gasoline?

A. No. We had the agitators. Kerosine agitators. They weren't for that purpose. We have to have them in use.

Q. You have those in use?

A. Yes. We have to have them.

Q. Now, when the Cross cracking units were finished in September did you start to run them?

A. Yes, sir. Started to run them for a short period from September fourteenth until September twentieth. Then we had to shut them down to make up some leaks—that was only in this first run; and we cleaned them out and started them off on September twentieth and kept them going, with [fol. 183] the exception of the cleanout periods.

Q. Now, were you present when the initial test was made?

A. Yes, sir.

Q. Were you advised at that time of what the initial test was to show? That the cracking units would do? What they were to perform?

A. Yes, sir.

Q. Did they so perform under the test?

A. Well, that is, now, for the Cross cracking units in themselves. Originally we were to have a process for vapor phase filter tower that was to be used in connection with the copperized clay——

Q. I understand that. I am not asking you about that now. What I am asking you now is, you did open up and run the Cross cracking units as soon as they were finished by the Kellogg & Company contructing organization?

A. Yes, sir.

Q. Now you made a test run, as I understand?

A. Yes.

Q. Now, I am asking you—I did ask you, and you said you knew what performance it was to do?

A. Yes.

Q. Now, in that test, did it do it?

A. Yes.

Q. It met the requirements of performance that it was to do?

A. Yes.

Q. Tell the jury what that was?

A. Well, it was to make what we call 437 end point.

Q. 437 end point. Now end point has to do with the heating, does it not? The boiling?

A. Well, that has to do with the specification——

Q. Well, explain it to us. What is that end point?

A. Well, you take a hundred-cubic-centimeter-flask and in the top of this flask put—in the top of this flask there is a thermometer in the top. And the vapors pass through a copper tube. That tube is submerged in ice water—an ice water bath. Well, the first drop that comes over through this here tube is what we call our initial boiling point. And when the first drop comes over we see what the temperature is. Say, for instance, it is 110; then the initial boiling point [fol. 184] of that particular gasoline would — 110; the initial. Then we carried that over at the rate of two drops a second until the flask is practically dry or the temperature at the top of the flask stays stationery—no rise or no drop; neither rising or lowering. That is the end point of the gasoline.

Q. You mean by "carrying it on" that you increase the temperature?

A. Yes. You keep gradually raising the temperature.

Q. So when you get it so it affects it no longer by heat, then you have your temperature which registers your end point?

A. Until it is all vaporized.

Q. Yes, Until it is all vaporized. Now, you knew what the specifications were to be on the test?

A. Yes.

Q. And they met the requirements of the specifications?

A. Yes, sir.

Q. And was the plant acceptable to you and your brother who were in charge of its operation? That is, the cracking units now? So far as the cracking units were concerned?

A. That is, without this vapor phase system?

Q. Yes. Only so far as the cracking units were concerned?

A. Yes.

Q. Now, was there any construction of any kind of a vapor phase tower commenced there by the Gasoline Products Company?

A. No.

Q. How long did you operate the cracking units until you finally got a tower?

A. We operated the cracking units up until March. The vapor—we put in the vapor phase filter towers ourselves. One tower was completed in February. February eighth,——

Q. 1927?

A. 1927. And the second tower was completed *in* February 23rd. Now——

Q. 1927?

A. Yes. Now as soon as we had the first tower completed we operated with pressure stills as a completed unit through the one vapor phase tower. And then when the other tower was completed, on February 23rd, 1927, we [fol. 185] started through the other vapor phase tower with the complete unit—cracking and all—right through. Well, of course, we had quite a stock of unfinished——

Q. Well, I am going to get to that.

The Court: Before you get to that I think we will take a recess of ten minutes, gentlemen.

(Recess here at 3:40 p. m. for ten minutes.)

Q. Mr. Slater, I think I interrupted you in one of your answers with reference to the treating towers that you finally built in connection with your Cross cracking unit. You called it to my attention during the recess. Will you finish that answer?

A. What I was going to say, we were real anxious to get our vapor phase filter towers in operation just as quick as possible in order to make a finished product, so we finished the one filter tower on April the 8th—or I mean February the 8th, and immediately put it to work, and we finished the second one on February the 23rd and put it right to work. Then we had a third tower that was used as a spare tower, but was completed, Oh, I should say about two weeks later. We have three filter towers.

Q. Now is it necessary to use three towers simultaneously in handling the product from the two Cross units—cracking units?

A. Yes, sir.

Q. What do you have the spare tower for then?

A. You say continuously?

By the Court:

Q. Do you have to use the three towers all at the same time?

A. No, I thought he said continuously.

Q. No, I said simultaneously. What is the spare tower?

A. Well, the spare tower is very often—well it is necessary to change your clay, and there a- lots of times during the operation one filter tower will get off color and it is necessary to change it, to shut it off and steam the clay out. [fol. 186] Q. The purpose of it then, if one tower is being cleaned or gets out of fix, you have another one?

A. Yes, sir; you have a continuous operation.

Q. In running Cross cracking units or any kind of a cracking plant for that matter, there has been spoken of here a number of times what is known as shut-down times. I want you to tell the jury about the shut-down time and apply it to your Cross unit.

A. Well, in the cracking of hydrocarbons you have what we call a reaction chamber, and during the process of cracking these vapors pass through this reaction chamber and gradually builds up coke, petroleum coke, in the reaction chambers. It will take—in our case we get about a ten day run. We can make a ten day run. Then it is necessary to shut down, clean the reaction chamber, and clean all the tubes out and the pipes. Take all the coke and carbon out.

Q. Now how long does it take you to clean out? How many days or hours?

A. Twenty-four hours as a rule. Sometimes we will get them back in eighteen hours.

Q. Now what do you mean by shut-down time—when you refer to the shut-down time of the cracking units is the time you have to stop to clean them out every ten days, approximately?

A. Yes, sir.

Q. That shut-down time runs from eighteen to twenty-four hours, according to your capacity of the Cross plant?

A. Yes, sir; in some cases it may run from—more especially when we first started, the men being new it took as high as thirty-six hours to clean them, but after they did that three or four times why they got acquainted with the method of cleaning and we was always generally able to get them back on in twenty-four hours.

Q. Now, in conducting your refinery, do you run it night and day?

A. Yes, sir.

Q. Do you run Sunday any?

A. Yes, sir.

Q. When you are in continuous operation, you never stop for Sundays, night or day or holidays, do you?

A. No.

[fol. 187] Q. Keep it steamed up all the time?

A. Continuous operation.

Q. Continuous operation?

A. That is with the exception of clean-out time.

Q. Now what kind of gasoline does the cracking plant make after you have treated that some product to make it marketable product, sweet to the doctor test, to clean it up? What do you call that?

A. The trade name?

Q. Yes.

A. No-knock gas.

Q. What do you mean by no-knock gas?

A. Well, it has a no-knock value. It is really a better gas than a straight-run gas on account of the high compression motors that are coming out. The straight-run gas will knock in a motor, and high-pressure gas will not knock.

Q. What is the reason for that? Why will the straight-run gas knock in the motor and the high compression gas or no-knock gas not knock in the motor?

A. Just because the cracked gas has these no-knock properties in it, and it is a better gas.

Q. Either that or the straight-run has the knock properties in it?

A. Yes.

Q. What do you say with reference to the efficiency between the straight-run and the no-knocks in the use of motors? Which is the most efficient?

A. Well, I will say the no-knock gas.

Q. Do you know what was considered by the trade in 1926 as being the most efficient? Answer that yes or no, whether you know what the trade considered?

A. The most efficient?

Q. Yes; do you know?

A. The cracked gas.

Q. I asked you to answer it yes or no, but you didn't do it. Now the trade considered the cracked gas or no-knock gas more efficient?

A. Yes.

[fol. 188] Q. Do you know what the demand was in 1926, during that year, in the trade, for the no-knocks, relative to the straight-run?

A. There was a good demand.

Q. I am asking you now in comparison with straight-run where was the greater demand?

A. Well, there was a greater demand for the no-knock gas.

Q. What quantity of charging stock did your refinery have on hand when the cracking units were ready for operation in September, 1927, after Kellogg got them built?

A. Well, it was right in the neighborhood of 12,000,000 gallons.

Q. Of what kind of product?

A. Gas oil.

Q. That is the charging stock for the cracking units, the Cross cracking units?

A. Yes.

Q. Reducing that to barrels, Earnest, or Mr. Slater, how much does that make approximately?

A. Around 300,000 barrels.

Q. Did you have sufficient charging stock either on hand or acquirable by reason of your supply to your refinery so that your cracking units could continuously run after they were started—after they were finished and started?

A. Yes, sir.

Q. Were you in a position to provide your refinery at all times with sufficient stock to run the cracking units at full capacity?

A. Yes, sir.

Q. You have now built some Vapor Phase treating towers, and they are applied to the same capacity? They are two Cross units, are they?

A. Yes.

Q. You didn't add any more Cross cracking units than the two that have been in question here?

A. No.

Q. You haven't done that and never did?

A. No.

Q. Was it necessary to have the three tower sto efficiently run and accommodate the two Cross cracking units?

A. Yes.

Q. Now, Mr. Slater, there is one question that I want to ask you, which relates back to something that I have already asked you. I asked you if when the cracking units [fol. 189] were completed and the test was made whether or not they met the performance required. Did you know at the time what the contract of performance called for,—what we term here as the guaranty contract as to capacity?

A. Yes.

Q. I did not make it clear to my own mind. Did it perform up to the requirements of that guaranty contract?

A. Yes.

Q. It did all that the guaranty contract said it would do?

A. Yes.

Q. I was asking about the tower capacity; not for the purpose of proving any element of damage; but the two 2,000 barrel units would make a total of 4,000 barrel capacity, and it takes three towers to handle that?

A. Yes; efficiently.

Q. What grade of gas oil did your refinery accumulate prior to September, 1926, when these towers were ready for operation,—not the towers, but these cracking units?

A. We had what we term in the trade a 32-34 gravity gasoline.

Q. Instead of using the refinery terms, state to the jury whether that is a high grade or low grade or intermediate grade, or what kind is it?

A. It is a very good grade of gasoline.

Q. That you would term as a high grade gas oil?

A. Yes.

Q. What was the policy of your company with reference to the grades of products that it produced?

A. What do you mean? The quantity?

Q. Quality?

A. It produced the best.

Q. In the year 1926, and subsequent years for that matter, did you produce a quality of products that had any merit over the ordinary products purchased for the trade?

A. Yes; we considered that they were; that we really had better specifications than some of them.

Q. What you mean by "specifications,"—that takes into consideration, of course, the high gravity?

A. Yes; the boiling point.

Q. Did you have any personal information with reference to the efforts that were made to build the treating towers [fol. 190] to be used in conjunction with your Cross cracking units at the time that it was being done?

A. Yes.

Q. Did Mr. Keith visit the refinery during that time?

A. Yes.

Q. Often?

A. Oh, he was there several times, yes.

Mr. Hale: Just what do you mean by "that time"?

By Mr. McKeever:

Q. Well, I will ask you to qualify that. What period of time was it that those visits occurred? What time did it cover?

A. Well, it covered the time before we bought the cracking units and after we bought the cracking unit. I think probably the last visit that I remember of Keith making there was around July; may be August.

Q. 1926?

A. Yes.

Q. During the time that he was there did you have any conversation with him on any of those visits with reference to the furnishing of your company with this particular Cross vapor phase treating system tower?

A. Yes; on two or three occasions.

Mr. McKeever: I shall ask Mr. Keith about that, and then call the witness later, if necessary, owing to the ruling of the Court.

Q. I want to fix that time a little more nearly for future purpose, Mr. Slater. You knew when the contract was closed to put in the Cross cracking units, didn't you?

A. Yes; I knew it that day.

Q. Were these conversations that I have referred to, any of them, after the day the contract was closed and before the cracking plant construction was completed?

A. Yes.

Q. Now, within that period of time that I have mentioned what is your recollection with reference to the number of times you talked with Mr. Keith on this particular subject now?

A. You want that after the contract was signed?

Q. Yes; and before the cracking plant started to run; before its completion?

A. Well, I seen Keith the day the cracking plant was signed.

[fol. 191] Q. The cracking plant contract?

A. The cracking plant contract signed; and then I see him once after that, that I know I discussed the vapor phase filter tower. As to the third time, I couldn't exactly say whether we discussed the vapor phase filter tower or not.

Q. When you say the "filter tower," that is applying another name to it? You mean the vapor phase system treating tower?

A. That is our common name of expressing it around the refinery.

Q. A filter tower?

A. Yes.

Mr. McKeever: Now, I believe, if Your Honor pleases, that the other notations I have would go to the other subject, and I will allow the cross examination with the permission of the Court to recall this witness on the other subject if desired.

Cross-examination.

(Mr. Marsh:)

X Q. Mr. Slater, Mr. McKeever asked you with reference to the Cross cracking plant of the methods of treating cracked gasoline produced by that plant, available; and you referred to an acid treating plant and then in a general way to vapor phase treating. Now, wasn't it true that there was still another method in use that was known to you, namely the Simms method of liquid phase treating?

A. Well, there was another method known; as the Simms Liquid Phase Treating.

X Q. Well, it was in operation at the Simms plant at Dallas?

A. I understood that to be the Cross liquid phase.

X Q. Well, yes.

A. Well, I had never seen that. I never saw nothing in regard to that, because I didn't investigate it.

X Q. But you were familiar with the fact that at that time such a system was in operation in Dallas?

A. Well, I couldn't say I was familiar with it when I had never saw it and investigated it. I was never at their plant.

X Q. So you are unable to state what the operation of that was, for the information of the jury?

A. Yes. Yes.

[fol. 192] X Q. Referring now to the acid treating method: Can you state what apparatus it would have been necessary to install in addition to what you already had in the plant?——

A. Yes.

X Q. (Continuing question)—to treat in that method the cracked gasoline produced by these two two-thousand barrels Cross units?

A. Yes.

X Q. Will you state, approximately, what apparatus would be needed?

A. Well, we would have had to install an inclosed type continuous agitator. That is for the treating of the acid. And, at the same time, we would have had to have in—either worked over one of our present shell stills or would have had to put in—purchase and put in—either a shell still or pipe still. We would have had to have fractionating towers

X Q. Or use the fractionating towers that you had?

A. Well, we had none available. That is, they were very limited on fractionating towers at that particular time. In fact, our fractionating equipment was, you may say, poor——

X Q. Was it inadequate to fill the requirements of your skimming plant? Is that it?

A. Yes, it was.

X Q. Can you state approximately what the cost of these different pieces of equipment would have been sufficient

in capacity to have handled the output of this four thousand barrel cracking plant—cracking unit? Just approximately?

A. Well——

X Q. Just to get the idea for the jury as to what it would have cost?

A. Well,—Oh, in the neighborhood of ninety thousand dollars.

X Q. That is, for the whole works?

A. Yes. I understand. Probably it may run more or less. But in the neighborhood of that.

X Q. Does that include an estimate of tankage? Additional tankage?

A. No.

X Q. But that does include the agitator you spoke of?

A. Agitator, yes. Tower. Of course you understand [fol. 193] that is a rough estimate. Agitator, still, tower. I may be low on that estimate you understand.

X Q. Yes. I understand. And also fractionating equipment?

A. Yes.

X Q. Which you were already short of, at that time?

A. Yes.

X Q. Do you, or did you at that time, know what type of treating was in use at the other Cross cracking plants?

A. Oh, yes.

X Q. Can you state what methods were in use in some of the neighboring plants?

A. Well, some of the Cross plants had the towers and some of them used the acid and re-run process.

X Q. Which would you say was most in use at that time, with the Cross cracking plants? Simply referring now, you understand, to the mid-continent field?

A. Well, of course, now, with the Cross cracking units in the mid-continent field, there wasn't so many of them out there at that time, and probably there were more in use with the acid and re-run process. But I wouldn't say——.

X Q. Do you know of any that were in use with the Gray vapor phase process at that time? Besides the Barnsall——

A. Well, the Barnsdall had the Gray process; and the Marland.

X Q. Well, was the Marland plant completed at the time you were discussing this installation of the Cross cracking units, in January of 1926?

A. No, it wasn't completed at that time. They completed that plant, and then come over and put ours in.

X Q. So, for the most part, they were using acid treating with the Cross cracking units, of which you knew, at that time?

A. That is to the best of my knowledge. Yes.

X Q. Now, will you state whether you could have taken the cracked gasoline produced by these cracking units and run it through your ordinary steam stills, mixing it up with [fol. 194] your crude oil charging stock? And then treated it with the chlorine treatment?

A. To mix it? Mixing it together?

X Q. Yes?

A. No.

X Q. Could you have run it separate with the crude?

A. Probably if you had shut something down, and we would have had to make changes in our equipment to do that.

X Q. On account of the shortage of equipment?

A. Yes. In the re-run like that you have to have a very efficient tower and use plenty of steam in it in order to hold the color and try to get the product as good as you can.

X Q. Assuming you had made such changes as were necessary, would it have required any other treatment than the Doctor treatment? That is, litharge treatment or the chlorination treatment?

A. Well, the acid treatment. Then re-run it, and then after re-running it it would have to be sweetened with either hydrochloride or the Doctor solution.

X Q. That was a perfectly practicable way? Of handling the Cross cracked gasoline?

A. Oh, yes. Where you had the equipment available.

X Q. You referred to the two methods of treating the gasoline to make it sweet to the doctor test. One of them, I believe, was the cholrination treatment that you have at the plant?

A. Yes, sir.

X Q. What was the other method?

A. The doctor solution.

X Q. And using litharge and caustic soda?

A. Yes.

X Q. Will you state to the jury what would be the approximate output in barrels of unfinished gasoline of these four thousand barrels Cross cracking units? That is, how many barrels a day roughly? Of the unfinished gasoline that had to be treated.

A. Well, it would be in the neighborhood of twelve to fourteen hundred barrels a day.

X Q. And that would be the unfinished gasoline for which you have to provide treating capacity of some kind?

A. Yes.

[fol. 195] X Q. Would— What was the approximate cost of the apparatus required simply for the cholrination treatment of that amount of unfinished gasoline? Just the chlorine part, leaving out the filter towers?

A. Well, it would run somewhere in the neighborhood— Well, four to six thousand dollars.

X Q. Yes. At the trial last year, you said somewhere around four thousand dollars. That, of course, is an off-hand estimate?

A. Yes.

X Q. Will you estimate what would be the approximate cost of the apparatus necessary to use the litharge or the doctor solution method of sweetening this same amount of gasoline per day?

A. Just the "doctor" alone?

X Q. Yes?

A. There wouldn't be much difference, I guess.

X Q. From four to six thousand?

A. Yes. Just for the doctor solution.

X Q. And that would have been sufficient to handle the output of the unfinished gasoline of the Cross cracking units? That is, without the filtering? I am confining my questions now to the sweetening only?

A. Yes, sir.

X Q. Do you use Garver crude at all, as a charging stock in your plant?

A. Yes.

X Q. That is a type of crude that is purchased in the oil fields neighboring?

A. Yes.

X Q. Do you use that type of crude for the most part in your operation?

A. No.

X Q. That is simply a part of your charging stock?

A. Yes.

X Q. Can you state whether, in using crude of this kind, it is necessary to chlorinate or otherwise treat to make sweet to the doctor?

A. Yes. We sweeten all of it. Straight run and cracked, both.

[fol. 196] X Q. Do all of the refineries in that field? Or is that simply on account of the special grade that you are producing?

A. Well, I know our neighbors do the same thing.

X Q. I had understood that some of that was of such high quality that you didn't need to give it the doctor treatment?

A. Well, any gasoline should be doctor sweetened.

X Q. There is some sold, is there not, that hasn't got that treatment?

A. Well, there may be, but it isn't good gas.

X Q. It is an inferior grade?

A. Yes.

X Q. Before you installed that Cross cracking unit—or these Cross cracking units—Mr. Slater, didn't your plant specialize on very high grade natural gasoline? Straight run gasoline?

A. Oh, yes.

X Q. And was this used, and advertised for general use in connection with aviation, air-motors, at all?

A. Yes.

X Q. Have you continued to advertise and sell that straight run gasoline for that purpose?

A. Yes.

X Q. Is that still featured? That is still featured, isn't it?

A. Oh, yes.

X Q. Can you state whether your company has sold gasoline to the mail routes flying west?

Mr. McKeever: That is certainly immaterial, if the Court please, and I object to it.

The Court: This is cross-examination. Of course we allow much latitude in cross-examination. Of course if he has any theory about it I should let him carry it out.

X Q. So you are still selling that straight run gasoline for the aviation purposes?

A. So far as selling it for the aviation business is concerned—I don't know. I am not connected with the marketing end of it. I make this stuff, and they sell it.

X Q. You testified, on direct, that in 1926, as I remember it, there was a stronger demand for the no-knock gasoline than there was for the straight run. Was that a matter that was within your personal knowledge?

[fol. 197] A. Well in that period of time the cracking people selling—the people selling this cracking process—put on a very extensive advertising campaign and put this no-knock gas before the public, and they certainly succeeded in doing it.

X Q. Yes. Do you remember when this campaign began, Mr. Slater?

A. I think it was back in 1925. I am not sure, now, but I think it was back in 1925.

X Q. Well, you are speaking more of the claim of the advertising, you *were* speaking more of the claim of the advertising, were you not, than the actual demands of the purchasers?

A. I am speaking from the purchasing of it and my own experience with it.

X Q. Your experience as assistant superintendent or simply what people told you?

A. As assistant superintendent, and my experience in the oil industry.

X Q. Wouldn't the market price be the best evidence for which type the demand was strongest?

A. Well, I don't know as the market price would interfere with that. Probably so. But, here, you have to convince the public on everything, and they finally was convinced that that was the best gasoline made. You go out and pay a premium for this no-knocks gas now.

X Q. That is what I am getting at. Aren't you spreading this, giving this answer with reference to 1926 with reference to facts that have been in fact a gradual development up to the present time?

A. Well, I will say that the demand was—there was a good demand for gas.

X Q. Was there not also a good demand for the straight run gasoline?

A. Well, a demand for both products.

X Q. Surely.

A. As a rule they demanded the no-knock. We have customers now that won't take the other gas. They want the cracked gas.

X Q. It must have been the result of this advertising, I presume?

A. Result of quality too. And a result of the profit as well as the price.

[fol. 198] X Q. Mr. Slater, reference has been made to the information conveyed to Mr. Champlin as to the excessive cost of recovering the copperized clay that was originally suggested for use in these so-called Cross vapor phase treating towers. Have you any personal recollection as to when that information was received at the plant? Can you now recollect when you first heard about it?

A. No.

X Q. Do you remember hearing about it at all?

A. About the infeasibility of the copperized clay?

X Q. Yes.

Mr. Hale: We can't hear the witness back here very well.

The Court: Speak a little bit louder.

A. I say about the infeasibility of the copperized clay in connection with the vapor phase filter towers?

X Q. Yes.

A. Well, I did hear that there was that claim made somewhere, I might be mistaken, around July or August.

X Q. You have no recollection of hearing that earlier than that?

A. No.

X Q. How did you get the information yourself, do you remember?

A. My brother told me.

X Q. Your brother told you?

A. Yes.

X Q. It was a matter of common knowledge around the plant, wasn't it?

A. Well, I don't think it was.

X Q. Common gossip?

A. No. We didn't gossip much around the plant about that.

X Q. Too busy?

A. Yes.

X Q. But you learned it from your brother. That was Mr. P. E. Slater?

A. Yes, sir.

X Q. He was the plant superintendent at that time?

A. Yes.

X Q. Now Mr. Slater, you referred in connection with these various methods of treating that were available—I have just referred to the Gray process of treating. Can you give a brief description of that process?

A. Of the Gray process?

X Q. Of the Gray process. Have you put that in?

[fol. 199] Mr. McKeever: No, I didn't get the description of the process.

Mr. Marsh: I think it would be useful to have the jury have that.

Mr. McKeever: I have no objection.

X Q. Will you state in as simple a way as you can, simply for the information of these gentlemen, how that Gray process—what apparatus was required or was used in the Gray process, what the nature of the operation was?

A. Yes. The Gray filter tower or vapor phase filter towers of the Gray process is a large, vertical shell, tank, and on the inside of this tank there is a partition which has perforated holes in it, and on top of these perforated holes we have a Monel cloth.

X Q. Sort of a filter cloth?

A. That is sort of a filter cloth. The purpose of this perforated plate or Monel cloth is to hold the Fuller's earth that is put into the vapor filter towers. Now this vapor—there is a space of approximately two to three feet between this partition on the inside of the shell and the bottom of the shell itself. That is for a vapor space. The vapors from the pressure still into the tower at the top, pass down through this bed of Fuller's earth, and go out through the bottom into a condenser box which is made up of a large tank with a lot of pipes from it submerged in

water, used for the purpose of liquifying the vapors that have passed through this filter tower.

X Q. What is the operation of the Fuller's earth?

A. Well, the vapors pass through the Fuller's earth and clarify the vapors.

X Q. That is what I mean. The clarification?

A. Clarify the vapors as they pass through there.

X Q. Makes it a proper odor and color?

A. Gives a little better odor and clarifies it and makes it what we call a water-like color.

X Q. But it still requires the chlorination treatment?

A. That still requires chlorination treatment, yes.

[fol. 200] X Q. I don't think you have stated as yet, what is the approximate cost per barrel of gasoline of the chlorination treatment?

A. You mean approximate cost a barrel?

X Q. Cost of operation?

A. A cent and a half a barrel.

X Q. What would be the approximate cost of treating by the litharge method? The doctor solution method, for the sweetening?

A. Well, I should judge it would run right around two cents.

X Q. That is an estimate in your case. You haven't operated with that yourself?

A. No. Oh, I have the plant, but not the system.

Mr. McKeever: That is all.

The Court: On this point.

Mr. Marsh: Except the reservation.

(Suspended until to-morrow morning at 9:30 o'clock.)

Forenoon Session (Thursday, April 25, 1929)

The Court came in at 9:55 A. M.

Mr. McKeever: If The Court please: under our agreement to systematize our procedure here Mr. Marsh wants to further cross-examine Mr. Slater on the subject we were on yesterday, and then I am going to announce that I will proceed with the matter of profits.

Mr. Linnell calls to my attention that one place in the record, page 254 of yesterday's testimony, there is an error

made where they have the word "profit" instead of "product." The reporter's attention is called to that.

The Court: You may remedy that.

(The correction was subsequently made in the report of evidence.)

Cross-examination of E. J. Slater resumed by Mr. Marsh:

X Q. Mr. Slater, you were telling me yesterday about the apparatus that you had in the plant in the Fall of 1926. [fol. 201] Now, will you state to the jury the capacity of steam stills,—straight-run stills,—that you had we will say September, 1926, actually installed there?

A. The crude capacity?

X Q. The crude capacity; yes?

A. Fourteen thousand barrels a day.

X Q. How much of that capacity was in use in September, 1926?

A. All of it.

X Q. Running crude?

A. Yes; running crude, wax, distillate and lubricating oils.

X Q. Was that equipment in use constantly from then on for the period of six months,—all of your steam still capacity?

A. Yes.

Q. Then will you state what the daily capacity of what you call fractionating equipment that was in place in September, 1926?

A. Well, now as to the fractionating equipment——

X Q. In the first place, state what equipment there was of that character?

A. Well, we carried shell stills and we had the fractionating equipment on each crude still. As far as the capacity is concerned, with the crude that we were handling, I must state here that our fractionate equipment was inadequate for the crude we were running. We didn't have sufficient fractionating equipment even for our crude.

X Q. Can you state in barrels per day of the distillate what the fractionating equipment would handle that you had installed there?

A. Well, I would have——

X Q. Tell me if I am asking a question that can't be answered?

A. No. That question couldn't be answered direct out.

X Q. But you can say that the fractionating equipment that you had was connected directly with the crude stills and was insufficient to handle the overhead stock from the crude stills?

A. Yes.

X Q. Now, in connection with the cracking units and equipment put up under this contract with the Kellogg Company, the contract that the Kellogg Company had with the Champlin Refining Company, that has been referred to [fol. 202] in this case, what would be the capacity of the fractionating equipment installed under that contract?

A. Well, we had a fractionating equipment on each unit for a capacity of two thousand barrels of throughput for twenty-four hours.

X Q. You mean by that the overhead stock from the unit?

A. No. Charging stock going to the unit. Out of that there two thousand barrels there would be only in the neighborhood of thirty to thirty-one percent overhead.

X Q. And you had fractionating equipment sufficient to handle the thirty to thirty-one percent overhead?

A. Yes.

X Q. Was there any excess capacity in that fractionating equipment to fractionate more than that thirty or thirty-one percent of overhead stock from the cracking units?

A. No.

X Q. Are you sure of that?

A. Oh, there might have been, maybe, fifty to a hundred barrels. Well, I couldn't say that. No. It was only sufficient to handle the charging stock to the furnace.

X Q. You don't know, from actual test, what excess capacity there might be in that regard?

A. I could answer you in this way: We start out a cracking unit, and you generally steam out your vaporizer and bubble towers, and that lets a lot of water in the trays in the bubble towers. And on first starting, rather than put this here slop, as we call it, into the vapor phase filter tower, we cut it into the slop tank and then, after we get the unit going strong, we would gradually feed a little of

this here slop back into the bubble tower; and we weren't able to get but a very little in there on account of our limitation of equipment.

X Q. You would use the excess heat in the top of the bubble tower to handle this slop in excess of the overhead stock coming from the cracking unit?

A. Yes. But that would be very slight.

X Q. That would be slight?

A. Very slight. Yes, sir.

Redirect examination.

By Mr. McKeever:

Q. Mr. Slater, further developing Mr. Marsh's line of questioning, I will ask you this question: At the time the [fol. 203] cracking plant was completed—the two units—and ready for operation in the month of September, 1926, did you have any equipment in your refinery which could be used and was available for treating this unfinished gasoline that might be produced from the cracking unit?

A. No.

X Q. Could you have used any of that equipment for that purpose if it hadn't been in use?

The Court: What?

X Q. Could you have used any of that equipment for further treating the unfinished gasoline, if it hadn't been in use?

The Court: If what hadn't been in use?

Mr. McKeever: The equipment. I asked him first if he had any equipment there that wasn't in use or that he could have used in finishing this gasoline after it was cracked?

A. No. We didn't.

Q. Then there was no other way available at that time?

A. No.

Q. In that same connection I desire to ask you if you had provided that equipment to finish your unfinished gasoline by some other means than the liquid phase treater—I mean the vapor phase treater—what do you say with reference to the relative time and expense in equipping yourself, as between the two methods?

Mr. Hale: Well, I don't understand the question.

Mr. Marsh: Let's hear that question again.

(Question read by reporter.)

The Court: It isn't clear to me.

Mr. McKeever: This is the line of questioning that was developed by them yesterday—what would be his estimate of the cost to supply himself with a certain kind of equipment for a certain kind of method of treating this unfinished gasoline.

The Court: Supplying himself with other apparatus?

Mr. Linnell: Yes sir. This is along the line of questioning that was developed yesterday. And that question didn't relate to supplying vapor phase filter towers. Now, Mr. McKeever's question is directed towards the comparative [fol. 204] cost of erecting the vapor phase towers and this other method which they inquired about; and also the relative time, as between the two, that it would take to construct one or the other, if I understand it correctly. Is that right?

Mr. McKeever: Yes. I think counsel on the other side are complaining principally on the way I have put the question, and maybe it isn't quite clearly put.

The Court: Of course the witness is an expert, and we quite possibly don't understand many of these questions that are perfectly clear to him.

Mr. McKeever: Well, may I withdraw that question, and divide it into two questions?

The Court: Certainly. Oh, yes.

Q. Mr. Slater, what would be the difference in the erection, in point of time, of the vapor phase system treating towers to provide yourself to finish the unfinished gasoline, and to provide yourself with the other system of treating it that has been described here?

A. That is the acid treating and re-running?

Q. Yes?

A. Well, you could provide yourself with a vapor phase filter tower quicker than you could the other.

Q. The other what?

A. The treating and re-running equipment.

Q. Why so?

A. Well, because there is more equipment necessary to the treating and re-running; considerably more attached

to it. You have to put in—you have to have—fractionating equipments—or rather towers—and a still of some nature, a treating system, and there is a lot of piping connected with it; pumps, and one thing or another.

Q. Can you tell this jury, then, approximately how long it would have taken—what length of time it would have taken—to have established such equipment in your refinery?

Mr. Hale: Such as what? What equipment?

The Court: Yes. Such as what?

Q. Such equipment as would perform the acid treatment to finish this unfinished gasoline?

A. Six months or better.

[fol. 205] Q. Now I will ask you what would be the difference in cost of the construction and equipping of a system of vapor phase treating towers to treat this unfinished gasoline, and to construct the other system of the acid treatment?

A. Well, I should say, offhand, that the treating and rerunning equipment would cost in the neighborhood of three-quarters more than the vapor phase.

Q. You would say for sure, then, that it would cost more, would you?

A. Yes.

Mr. McKeever: Now, if the Court please, under our arrangement, the principal purpose of this testimony will be directed toward the proof of the measure of damages——

The Court (interrupting): Yes. That is, from this point on your proof will be directed toward the point of damages based on lost profits; or until further notified.

Mr. McKeever: Yes. And I was about to say that there may be some questions—some general questions—that are general in their nature, and when the auditor comes with the figures it will then divide itself absolutely.

Mr. Hale: And it is understood that all questions relating to loss of prospective profits are objected to by the plaintiff, and the plaintiff's right protected.

The Court: Yes. They are admitted against your objection, and you are allowed an exception.

Q. Now, Mr. Slater, you have already stated, and it has been said a number of times, and I am only restating it for the purpose of a preliminary foundation, that the capacity

of the two Cross cracking units purchased from the Gasoline Products Company was two 2000 barrel stills?

A. Yes, sir.

The Court: You mean the finished product of 2000 barrels a day, do you, by that?

A. No. That is charging stock. Charging stock.

The Court: I see. Then you only got about 1200 barrels a day?

A. Yes. That's it. Yes.

The Court: I wanted to understand that, and wanted the jury to understand it.

[fol. 206] Mr. McKeever: We are going to develop that right now; in connection with that.

Q. Now, when I say two 2000 barrel stills, what kind of stock is it charged with?

A. A mixture of fresh gas oil and recycled stock, makes up the charging stock.

Q. Now, where do you get that, Mr. Slater?

A. Well, the fresh gas oil comes from our skimming plant, and crude stills. The recycled stock is obtained from the bottom of the bubble tower, in that cracking unit itself.

Q. Some of it goes through but you don't get all the gasoline out and you circulate it around and run it through again. That is recycling?

A. Yes.

Q. And your fresh oil comes from your skimming tank, and with charging stock made of that combination each unit will handle 2000 barrels a day?

A. Yes.

The Court: What proportion of each?

Q. Yes? What proportion of each?

A. Well, you would run in a proportion of sixty percent, in some cases, and forty percent fresh stock; or in some cases it is fifty-fifty; fifty percent each. There is a variation.

Q. Now after the cracking units were constructed and ready for operation with that capacity, what would have been the equipment necessary to handle that capacity which constituted this vapor phase system treating towers, how many towers?

A. Three.

Q. Now as you explained yesterday, two towers will handle it if you have a tower to operate a shut-down period, and the other one is idle, as you explained yesterday?

A. Yes.

Q. Now during the period from the time the cracking units were ready for operation up to the time when the towers which you now have were installed, did you run the two cracking units full capacity, in accumulating the——

A. Yes, sir.

Q. The stock?

A. Yes, sir. To run them to full capacity?

Q. Yes.

A. Well, I couldn't say that we run them to full capacity because we didn't have the equipment in there to finish [fol. 207] it up and make it a finished product, and we weren't trying to crowd it for all that was in it, because there really was no use in doing that when you couldn't make a finished product out of it.

Q. That is what I am asking you now, whether you run it full capacity or not?

A. No.

Q. I think I did ask you, but in connection with this subject I want to ask you again. I think you stated yesterday that the capacity of the Cross cracking units would make a recovery of 65% as stated in that guarantee?

A. Yes, sir.

Q. It would do that?

A. Yes, sir.

Q. Now you explain to this jury how you worked up that product and what were the elements that you get from those cracking units to make a finished product?

A. In our particular case now?

Q. Yes. Well, no, in the case as this would have been if supplied with a treater?

A. Yes. Well, we take our charging stock, put it through our cracking unit, vaporize it. The vapor is passed in through a reaction chamber, and from the reaction chamber into a vaporizer. From the vaporizer into the bubble tower. The lighter fraction passed off the top of the bubble tower into a vapor phase filter tower which is packed with Fuller's earth. After it passes through the vapor phase filter tower it passes through a series of condensing coils which are submerged in water for liquifying these vapors. The gaso-

line as it comes from this condenser coil has a color what we call a 30 plus of water white, a good, clear-colored gasoline, and from this vapor filter it still needs another process of treating, what we call sweetening to the doctor test. Then it passes through a chlorine gas filter.

Q. Now about that chlorine gas. If the copperized vapor phase treater were in operation you would dispense with that, wouldn't you?

A. Yes, sir; it would have been a finished product.

Q. I am talking about a treater with the copperization.

A. Well, to add the clay, the copperized clay, would make [fol. 208] a finished product direct from the vapor phase filter towers ready for the——

Q. You explain to the jury what is meant by this 65% recovery in this guarantee that has been offered here?

A. Well, the 65% guarantee that was offered there is the gas—the motor fuel coming from the Cross unit, or 65% ultimate yield.

Q. Is that a finished product ready for the market, that 65%?

A. Yes, sir.

Q. And this capacity would recover that?

A. Yes.

Q. And will recover it?

A. Yes.

Q. Now the fact of the matter is, the treater that you finally put in, as far as its operation and the result of that operation is concerned, was exactly like the Cross vapor phase? I mean in working principle. I don't mean in exact construction, except it didn't have the copper; is that right?

A. Yes.

Q. Would it do the same thing that the Cross would do except it didn't have the copper?

A. Yes, sir.

Q. And that lack of that copper causes the necessity of the chlorine?

A. That is right.

Q. To make a complete marketable product?

A. This is right.

By the Court:

Q. That is cheaper than the copperized clay, it is?

A. Well, of course we haven't got the copperized clay in there.

Q. You never had any experience with copperized clay, did you?

A. No.

Q. Now, Mr. Slater, was your refinery during the time from the installation of the Cross cracking units and up to the time the treaters were put in by yourselves, amply supplied with charging stock for this cracking plant at all times?

A. Yes, sir.

Q. Was the stock available at all times?

A. Yes, sir.

Q. Mr. Linnell suggests now that I ask you about the fuel oil. Was there any fuel oil in this operation?

A. In the Cross cracking unit?

Q. Yes.

A. Yes, sir.

[fol. 209] Q. Now that is what I started to ask you a while ago, and I forgot to follow it out. You go ahead and tell what becomes of this product now so that it will use up the whole soup pot in the cracking plant? Dispose of it, to the jury, so they will know where it has all gone.

A. Well, starting out with the Cross unit, as I explained before, you get your light vapors and recycled stock which is charged back and recycled back through the unit, and you ultimately get a yield of 65% gasoline, and in the process of the manufacture we have what we call a fixed gas, a non-condensible gas that is used for firing the unit after we get it up on the stream and get it started its own fuel will take care of it, it will fire with its own fuel. In addition to that we have a heavy fuel, 12-14 gravity fuel oil, that comes off at the bottom of the vaporizer, which would amount to 25% of fuel.

Q. Now then the elements that account for the throughput is the 65% gasoline, 25% fuel and 10% fixed gas?

A. Fixed gas and loss.

Q. Fixed gas and loss in operation?

A. Yes.

Q. That accounts for your 100% throughput?

A. Yes.

(By the Court:)

Q. The fixed gas is no use to you, is it?

A. Only as a fuel. Sort of a nature of a natural gas.

Q. Now, Mr. Slater, for the purpose of the auditor's calculation I am going to ask you with reference to the expense of operation. What would have been the expense, or first I will ask you if you know as a positive fact what the expense would have been— I don't mean you can call right off, but that you can calculate it, so you have sufficient knowledge to calculate it as a positive fact, what the expense would have been of operating the Cross cracking units in conjunction with the vapor phase treating towers with the copperized clay for the period from the time the cracking units were ready for operation to the time you finally got it treated?

The Court: Finally got it what? Finally got it treated?

Mr. McKeever: Yes.

The Court: What was the first part of the question?

[fol. 210] Q. I am asking this question, what the expense of operation of that plant would be for the five months shut-down period as we term it, our shut-down period, when we didn't have this treater. I am asking if he knows what that would be.

Mr. Hale: The expense of running the cracking plant?

Mr. McKeever: Yes, the cracking plant, with the treater.

The Court: He didn't have any treater. He didn't have any treater.

Mr. McKeever: No, but I am asking him if he knows what would be the expense of running it with that combination? A plant of that kind.

The Court: If he had a treater?

Mr. McKeever: Yes.

The Court: If he had what kind of a treater?

Mr. McKeever: Copperized, what we contracted for.

The Court: The one you say he agreed you should have?

Mr. McKeever: Yes.

Mr. Marsh: If he knows.

Q. I am asking if he knows. That is what I asked him.

A. With the copperized clay?

Q. Yes, what the expense would be running a completed plant of that kind?

A. Well, I couldn't testify as to the copperized clay because we didn't have it.

Q. Well, I will ask you this: I will bring it about in this way: Give us the expense of the operation of the Cross cracking unit.

A. I can give you that.

Q. I want you to give it to me.

The Court: That is without any treater?

Mr. McKeever: Yes.

A. Am I permitted to refer to notes?

The Court: Oh, yes.

Q. Did you make a calculation of that so that you can——

A. Well, I have.

[fol. 211] Q. Now read that off as you have calculated that expense.

A. (Reading:) Three operators at $3.75 per day, three control men at $5 per day, three firemen at $-.50 per day, three gaugers at $4 per day, six clean-out periods per month including a mechanical repairman, $131 a month, making to total of $2,218.50 for labor.

By the Court:

Q. That is for one month?

A. For one month, yes.

Q. You have used the month as your unit?

A. Yes.

Q. All right. Go ahead.

A. Fuel oil, twenty barrels of fuel oil six start up periods. You see you use fuel oil in order to get your unit started. Then the fixed gas would take care of it itself. It would fire on its own fuel. This would amount to $150 per month.

Q. Was that based on the market of fuel oil at that time?

A. That was based on the market of fuel oil at a dollar and a quarter a barrel which was at that period.

Q. The prices you have fixed here are the prices of that period?

A. Yes, sir. Electricity for the lighting and electrical equipment for recording temperatures, $121 a month. Steam 400 boiler horse-power, at one cent, or $96 per day, making a total of $2,880.

Q. For what period?

A. For a month. Water, 500 gallons per minutes, $600.

By Mr. Hale:

Q. $600 a month is that?

The Court: Yes, $600 a month. 500 gallons a minute, did you say?

The Witness: Yes, sir. Do we want to eleminate the sweetening process?

Mr. McKeever: Well, now we are, for the present. I am going to get that in in a minute.

Q. There is an item of workmen's compensation there. You are not familiar with that?

A. No.

Q. The auditor will provide that. Now, Mr. Slater, that which you have given constitutes the expense of those items you have mentioned for operating the cracking plant [fol. 212] per month, which are calculated on the prices for the labor and commodities during the period between the time the cracking units were ready to operate and the time at which your treater was finally installed.

A. Yes, sir.

Q. All right. That is without the final treatment to make it a finished product, isn't it?

A. Oh, yes.

Q. Now have you computed what the treating of the gasoline costs?

The Court: By what kind of a process?

The Witness: Chlorine for sweetening.

Mr. Linnell: The present process.

By Mr. McKeever:

Q. Now that is your present process?

A. The chlorine for sweetening, yes.

Q. If you had had the copperized clay and that had been done all in one process or one pass, as it has been used here, there would not be any chlorine cost, would there?

A. No.

Q. So that the cost that you have given, if you had had a treater with the copperized clay, that would produce all in one operation a fiffished product, the expenses you have already given for those items would be fully covered?

Mr. Hale: Just a minute. That is an argumentative question.

The Court: I don't think you have given the correct basis. The figures that he has given so far are just for the cracking operation.

Mr. McKeever: Yes, sir. Now I will ask him this:

Q. If the treaters had been installed as per contract, would there have been any additional expense to what you have given?

A. Well, there would be a clay handling expense.

Q. Give that?

Mr. Hale: I object unless this witness can qualify with some knowledge.

Mr. McKeever: I will qualify him on the clay.

Q. Do you know what the clay expense would be, that is, without the copper now?

A. Yes.

[fol. 213] Q. Tell us what that would be?

A. Figuring the clay, which costs us about $5 per ton for handling, that is, for charging it into the unit and taking it out, at times when you have to replace your clay, and figuring that the clay will produce 8,000 barrels of finished gasoline per ton, you would have a cost of $5 per ton for clay, or 44 tons of clay at $5, $220.

Q. Per month?

A. Yes.

Q. Does it take any more labor, heat and power to operate the Vapor Phase Treater, in addition to those used on the cracking units?

A. Well, there is no more labor connected with it, but there would be an item in there for steam. Two small pumps.

Q. If you had had a treating tower, copperized, to finish your product, would that have cost more or less to finish it that way than with the chlorine treatment?

Mr. Marsh: We have the same objection there. He has not qualified him as knowing anything about copper.

The Court: He said he didn't know anything about the cost of copper.

Q. Outside of the cost of the copper, would it cost any more?

A. Outside of the cost of the copper——

Mr. Hale: I think we will object to that, if Your Honor please.

The Court: I will let him answer.

A. Let me get your question just right. You want to know whether there would be any more cost to the treating of gasoline after it left the Vapor Phase filter tower, is that right?

Q. I want to know whether or not, in the first place, and I have asked you if you use the same labor to operate the crackers and the Vapor Phase towers, and I understood you to say yes, there would be no increase in labor?

A. No.

Q. Because the towers were added to your cracking plant, it would not increase your cost of labor?

A. No.

Q. Now you say these items you have given,—none of them would be increased except you would have to have a little more steam?

A. Yes.

[fol. 214] Q. Now, adding the copper would not cost any more in operation at all, would it? So far as operating expense is concerned?

A. No.

Mr. Hale: Just a minute. I ask that that answer be stricken out, and I would like to make my objection.

The Court: You mean you object to it as a leading question?

Mr. Hale: My point about the question is that it seems to me that my brother is trying to elicit from this witness information about the cost, operating cost, of a process of which the witness knows nothing.

Mr. McKeever: Well, I will leave the copper item out.

The Court: Exclude the copper.

Mr. Hale: I know, but I fail to see that the witness is qualified to answer any question about operating the copper tower.

The Court: Ask him if he knows about it.

Mr. McKeever: I am not asking him about the copper.

The Court: Ask him if he knows the cost of those items. (To witness:) Do you know the cost of the operation of this treating plant without the item of copper, other than the item of copper?

A. Yes, sir.

The Court: Go ahead and give it.

The Witness: Oh, you mean on the steam?

Mr. McKeever: I mean the treating plant and the cracking plant together. As I understand it, that is what the Court wants.

The Court: He has already given the cracking plant. How much more would it cost to operate a treating plant, leaving out the item of copper, which you are not familiar with?

A. Outside of the cost of the clay handling that I gave you, it would not cost any more.

By Mr. McKeever:

Q. And you have added the clay handling?

A. Yes.

Q. So the first items you gave plus this clay handling includes all that cost of operation?

A. Yes.

Q. All right. Now will you give the jury what the treating of gasoline costs per barrel by the chlorine treatment? [fol. 215] A. A cent and a half a barrel. I have that probably more closely than that, if you want it.

The Court: Can't you put that on a monthly basis the same as the other was based. Now you are giving the cost per barrel as against monthly cost, aren't you?

Mr. McKeever: Yes, but the auditor, in making his figures, satisfies that discrepancy.

The Witness: That would be decimal-04984 per barrel, or $525.94 a month.

Mr. McKeever: I think you read your decimals wrong. Read them again for the benefit of the Reporter.

The Witness: .014984.

Mr. McKeever: That is correct.

Q. Now that is based on the capacity of the plant which the contract calls for?

A. Yes.

Q. And also gives ample allowance for clean-out times and shut-down periods and all that?

A. Yes.

Q. Now, Mr. Slater, have you furnished these figures to the auditor of the Champlin Refining Company for the purpose of his calculation?

A. Yes.

Mr. Marsh: Your Honor, we ask the privilege of deferring the cross examination of Mr. Slater on this part of his testimony until we can have the minutes. It is so confused, and involves so many figures, that it is practically impossible to cross examine now.

The Court: Yes, I think that would be fair.

Mr. Glasser: No objection.

The Court: Then you are all through with this witness now, for the present?

Mr. Jones: All through.

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Charles C. Peppers, called for the defendant, having been first duly sworn, testified as follows:

Direct examination.

By Mr. McKeever:

Q. Mr. Peppers, state your name to the jury?

A. Charles C. Peppers.

[fol. 216] Q. Were you sworn the other day?

A. Yes.

Q. Where do you reside?

A. Enid, Oklahoma.

Q. In what business are you engaged?

A. Refining.

Q. Of what?

A. Crude pretroleum.

Q. With what company or companies are you connected?

A. Pepeprs Gasoline Company and the Champlin Refining Company.

Q. What position do you bear with relation to the Peppers Gasoline Company?

A. President.

Q. How long have you been connected with that company?

A. 1917.

Q. Since that time?

A. Yes, sir.

Q. How long have you been connected with the Champlin Refining Company?

A. The same date.

Q. Are you the managing officer of the Peppers Gasoline Company?

A. I am.

Q. What is its business?

A. Skimming plant operation and refining of crude oil and the natural gasoline business.

Q. What does that mean?

A. Production of gasoline from natural gas, from casing head gas.

Q. The manufacture of gasoline from casing head gas, and this casing head gas you obtain from natural gas?

A. From casing head gas itself.

Q. The casing head gas is natural gas?

A. No.

By the Court:

Q. What is casing head gas?

A. Your Honor, casing head gas is the gas that comes from the oil sand with the oil. It is separated at the top of the ground from the oil and is there gathered into pipe lines to compression plants or absorption gasoline plants where the gasoline is recovered out of it.

Q. When does it cease to be gas and become liquid?

A. You mean dry gas?

Q. What I mean by gas is something that you cannot see; not liquid?

Mr. McKeever: Vapor.

[fol. 217] By the Court:

Q. You say this comes out of the sand. At that time is it liquid or vapor?

A. Well, the supposition is that it is gas vapor.

By Mr. McKeever:

Q. The gas that comes out of the oil sand and you separate it at the top of the ground, is at least—for the layman it looks like vapor? That is true?

A. Yes, sir.

Q. And you take it into one of these casing head plants and you take the gasoline content out of it, and then you have left what you call a dry gas that has no gasoline in it?

A. That is true.

Q. And when you get that gasoline content out of it you call that a casing head gasoline?

A. A natural gasoline.

Q. That is one of your activities, to manufacture that kind of gasoline? In addition to that you have a refinery, have you not,—a skimming plant?

A. Yes, sir.

Q. Prior to your experience with the Peppers Gasoline Company and the Champlin Refining Company, what has been your experience in the oil business and refining business?

A. Construction of natural gasoline plants and general work in the oil fields.

Q. For how many years have you been engaged in the oil business?

A. Sixteen years nearly

Q. Is a part of your conducting of your business to handle or direct the marketing of your products,—as the managing officer I mean?

A. Yes, sir.

Q. And do you keep familiar with the markets in your business of the different products,—refined products?

A. I do.

Q. Whether they are manufactured in your plant or some other plant?

A. Yes, sir.

Q. Now, Mr. Peppers, I wish you would tell the jury why the Champlin Refining Company installed a cracking plant when it did?

The Court: What does he know about that?

By Mr. McKeever:

Q. I will ask you if you know why?

A. I do.

[fol. 218] By the Court:

Q. How do you know why? Somebody told you about it?

A. No, sir; the general demand for the product that we were manufacturing from that plant.

The Court: He hasn't said what his office was in the Champlin Refining Company?

By Mr. McKeever:

Q. What is your connection with Mr. Champlin?

A. In a semi-official way on policies in connection with Mr. Champlin.

Q. Is he interested with you in the Peppers Gasoline Company?

A. He is.

Q. Are your offices together, in the same office?

A. They are.

By the Court:

Q. You are not an officer of the Champlin Company are you?

A. No, sir.

Q. Nor an owner in it?

A. No, sir.

The Court: When you ask him why that other company did something, he must know it by hearsay. Ask Mr. Champlin why he did it, and not this man.

Mr. McKeever: Perhaps later I will put him on the stand. He is familiar with it. I was going to develop the fact that he was or is in a capacity to know.

The Court: I do not think that is a proper question.

By Mr. McKeever:

Q. Do you perform any services for the Champlin Refining Company?

A. I do.

Q. What is it?

A. Purchasing of all of our crude oil, and in official matters pertaining to special deals of any nature which come up from time to time.

Q. Then I will ask you, when you say you are not connected with the Champlin Refining Company, are you not in the service of the Champlin Refining Company?

A. I am.

Q. You merely draw your salary from the Peppers Gasoline Company?

A. That is true.

Q. Are you familiar with the business policy of the Champlin Refining Company, and were you at the time these crackers were bought?

A. I was.

[fol. 219] Q. Were you then the crude oil purchasing agent for it and held that position in the company?

A. I was.

Q. I will ask you what the demand was, if you know, on the market for a cracked gasoline at the time of the purchase of these Cross cracking units?

Mr. Marsh: It does not seem to me that he has qualified Mr. Peppers to answer any such question as that.

The Court: He hasn't shown his familiarity with that branch of the business.

Mr. McKeever: I asked him if he familiarized himself and knew what the markets were a while ago on all kinds of petroleum products.

The Court: To make sure, qualify him to the extent that he knows what the values were

Mr. McKeever: I thought I had. I showed the years that he has been in the business, and is the manager of the company that manufactures these products, and that he kept himself informed, and as directing officer he knew what the market was.

The Court: I do not understand he went to that extent. If he does, let him say so. All you have got to do is to ask him.

By Mr. McKeever:

Q. What was your knowledge of the markets, at the time of the purchase of these Cross cracking units, for the products that they produced?

A. As far as my ability is able to do so I keep informed at all times on the sales of all petroleum products as well as the purchase thereof.

Q. Were you so informed at the time of the purchase of this cracking plant?

A. I think I was.

Q Was that a part of your business to be so informed? A. Naturally. In operating the business I should be informed.

Q. What was the condition of the market with reference to the demand for cracked gasoline at that time?

A. A swiftly increasing demand for the product.

Q. What created that demand?

A. Originally the construction of high compression motors; or I should say originally the campaign put on by the manufacturers of the cracking processes; then followed [fol. 220] up by the higher compression motors; and that product will naturally work in the types of motor manufactured several years ago.

Q. Now, why do the high compression motors have anything to do with it?

A. Because of its anti-knock value.

Q. Explain to the jury what you mean by the "anti-knock value"?

A. I don't know just exactly how to make the explanation to the jury; but in the high compression motor the straight-run gasoline has a tendency to ignite quicker than the compression gasoline or the cracked gasoline, and by that you get a little clatter in the motor which you do not get in the cracked gasoline. That is about the best way I know of explaining it to them.

Q. Is there any difference in whether or not—Sometimes we say we get carbon in the motor. Does it affect that in any way?

A. I don't think there is a great deal of difference in the accumulation of carbon between straight-run and cracked; possibly a little in favor of the cracked gasoline.

Q. Mr. Peppers, where is your skimming plant located with reference to the Champlin Refining Company plant?

A. Oh, twenty miles east.

Q. You called it a skimming plant. It is sometimes termed a treating plant? That is suggested by Mr. Glasser.

A. Not if you are talking about the plant. No, sir.

Q. That is located at Covington, Oklahoma, near the oil fields?

A. Yes

Q. Nearer the oil fields. Now, did you ship any of the unfinished gasoline from these cracking units during this period that they had no treater out to your plant for treatment?

A. Our company at Enid. Yes, sir. Shipped to us at Covington three cars.

Q. For what purpose?

A. Trying to work out some way to use the cracked gasoline, on account of it not being treated. I can explain to you how that all came about, if you would like to have me do so.

Mr. Marsh: I am unable to hear the witness over here.
[fol. 221] Mr. Glasser: Yes. Speak up louder, Mr. Peppers.

Mr. McKeever: Talk up. Your voice is entirely too soft.

A. Mr. Champlin and Mr. Slater were in conference in Mr. Champlin's office——

Mr. Marsh: Well, just a moment.

The Court: Yes. Don't tell what was said.

Q. Don't tell what was said; but you can tell how you came to do it.

Mr. Marsh: I think it would be better if the witness should be questioned so that he can answer each question as it is asked, and not let him go ahead and tell the whole story, the way he is apparently starting out to do.

Mr. Hale: What was that question?

(Question read by reporter.)

The Court: It seems to be difficult in arriving at what he knows about the matter.

Mr. Jones: He isn't a good speaker.

The Court: Let him go ahead and state what purpose these carloads of cracked gasoline were sent to him for. (To the witness): What were your instructions in relation to the gasoline sent you, and what did you do?

A. What did we do with that gasoline?

The Court: Yes. What did you try to find out, and what did you find out?

A. We tried to find out if it was possible for us to take the untreated gasoline and mix it with the sweet, straight run gasoline, in small proportions, and thereby use up the gasoline we were making at the Enid plant in our plant in Covington.

The Court: Well, did you find out you could do it?

A. No.

The Court: You found you couldn't do it?

A. Yes.

Q. Why?
A. Because of the corrosion——

Mr. Marsh: I can't hear what the witness says.
The Court: You must try to speak louder.

[fol. 222] Q. You just answer my question. Why? And put it plainly, and speak loud enough so that the reporter and the jury can get it.

The Court: Why wouldn't it work?
A. Because the mixture of this gasoline which was untreated with our sweet, straight run gasoline——
The Court: Your finished gasoline. Your treated gasoline?
A. Yes. Our treated gasoline. It threw it all off the corrosion and the doctor test; and color and odor.
The Court: That is plain.

Q. That wouldn't make a marketable product, then?
A. It wouldn't.
Q. Now, what would be the expense to it, even if you could have made a merchantable product?

Mr. Hale: Well, just a moment.
The Court: Well, it seems he couldn't make a merchantable product. There was no way, was there (to the witness), with any amount of expense, to make it a merchantable product?
A. No, sir.

Q. Now, Mr. Linnell suggests that he isn't sure you made it plain that this product you shipped out to your plant at Covington was the cracked product that came from the Champlin Cross cracking units?
A. That is true.
Q. It was?
A. Yes.
Q. And untreated?
A. Yes.

Mr. McKeever: I believe that is all.

Cross-examination.

By Mr. Marsh:

X Q. Mr. Peppers, you were testifying about your opinion as to the demand for cracked gasoline as compared with

straight run gasoline. Of what period were you speaking? I don't think Mr. McKeever made it quite clear.

A. Well, the season is practically the same. 1926 or

X Q. Well which?

A. Well, the season, is practically the same. 1926 or part of 1927.

[fol. 223] The Court: He means the latter part of 1926 and the first part of 1927.

Mr. Marsh: Yes.

X Q. Were conditions the same in 1925—1925 now—with respect to that, that they were in 1926?

A. Well, I think I testified that the demand for cracked gasoline was advancing swiftly.

X Q. So that conditions changed from year to year, as time went on? On that?

A. That would be my opinion with regard to the demand. Yes, sir.

X Q. That is, there would be more in '26 than '27, and more in '28 than '27, and more in '29 than in '28——

A. Naturally.

X Q. More in '29 than in '28. Is this still going on, in your opinion?

A. Yes.

X Q. Did you ever sell any cracked gasoline in 1926?

A. No. Except the three cars—and that was in 1927.

X Q. That was 1927, wasn't it?

A. Yes, sir.

X Q. So you personally never sold a gollon of cracked gasoline in 1926?

A. No, sir.

The Court: You mean cracked and treated? Or untreated?

Mr. Marsh: No. I mean cracked and treated for market. I am trying to test his experience and his knowledge about these matters he is testifying to.

X Q. Your own company, as I understand it, sold entirely the straight run product? Your own Peppers' Company?

A. That is true.

X Q. So, when you spoke of the demand for cracked gasoline, you were speaking simply of hearsay or second-hand information?

A. No. I wouldn't call it hearsay or second-hand information. It was information that I was in possession of by reason of being in contact with the sales managers, and the managers and the officials of other companies.

X Q. What other companies?

A. Well, all of the mid-continent companies.

X Q. But you didn't sell any yourself?

A. Absolutely not.

[fol. 224] X Q. You just sat around and talked about it with these sales people? Is that it?

A. With the sales people?

X Q. Well, these managers that you speak of? Who were they? The officials of these other mid-continent companies?

A. Owners of them.

X Q. Owners?

A. Yes, sir.

X Q. Can you refer to any specific sale of cracked gasoline in 1926, in any amount, at a price higher than the posted price of natural gasoline at the same time?

A. Of natural gasoline?

X Q. Or straight run?

A. Yes, I can.

X Q. Well, will you refer to some of those purchases?

A. Mid Continent Petroleum. I am talking about sales; not purchases.

X Q. Yes, sales. That is right.

A. Mid Continent Petroleum.

X Q. What dates?

A. Well, naturally, I can't recall the exact dates of all these things that——

X Q. Well, approximately what date?

A. Well, I would say the early fall or winter of '26; and the early spring of '27.

X Q. What quantity?

A. Well, I would say the quantity would be a large percentage of their available supply.

X Q. To whom were the sales made?

A. I haven't the slightest idea.

X Q. Do you know what the gravity was of the cracked gasoline?

A. 58-60.

X Q. What was the end-point?

A. I don't know. My general information is that—My general information on that is that we put all these groups out under individual brands, with no end-point specified.

X Q. Well, it was probably what?

A. I don't know.

X Q. That would make a difference in the value of it, wouldn't it?

A. Well, I understand——

Mr. McKeever: Well, if the Court please, I think possibly that question ought to refer to the market price, instead of the value.

[fol. 225] X Q. Well, I will say market price, of course?

A. The Court, I don't presume, would let me quote conditions existing now.

X Q. No. I am trying to test your knowledge at that time as to these particular sales that were used as the basis of your testimony. You know what the gravity was but you don't know what the end-point was. I am asking you, now, wouldn't that affect the market price of that cracked gasoline? Will you please answer yes or no?

A. Well, I'll say no.

X Q. That wouldn't affect the market price at all?

A. No. Not if it came within the range of usable product.

X Q. I ask you if it would affect the price, and you say no. Now, do you mean that?

A. Yes, sir.

X Q. If the range stopped at 400 degrees end-point, do you say it would still be the same amount as 437 end-point?

A. If they both contain the same anti-knock value. Yes.

X Q. Well, if it was 350 end-point? I am asking you? You said no. Now I am asking you—and I want you to be honest with the jury——

Mr. McKeever: I object to that.

Mr. Jones: I object.

X Q. I am sure he intends to be honest. But you haven't yet answered the question. The question is, if this gasoline was 350 degrees end-point, whether it would be of less market price than gasoline having the same no-knock qualities of 437 degrees end-point?

A. Well, if it sold under the brand, without regard to end-point, it wouldn't.

X Q. Do you know of any gasoline that was ever sold without regard to end-point?

A. I do.

X Q. Isn't it always assumed that the end-point will be within some specified range—Navy specifications?

A. No, sir.

X Q. Or something of that sort?

A. No, sir.

X Q. Well, we'll leave that there. Have you with you the oil price hand-book? Any of those compilations?

A. I haven't it right here with me. I have it somewhere here.

[fol. 226] X Q. Now, can you state whether the quoted price listed in the oil price hand-book refers to the end-point as well as to the gravity?

A. End-point as well as gravity?

X Q. Yes.

A. That is true.

X Q. That is true isn't it——

Mr. McKeever: I don't think that either the jury or I appreciate the point.

Mr. Marsh: I was trying to show this: That he has testified that there was a general demand for cracked gasoline as against straight run gasoline. Then he tries to make a comparison in prices. But one of the essential elements in price is the quality both as to the end-point and to the gravity.

The Court: That is the point you were trying to illustrate, was it? By that question? I see. Very well.

(Last question and answer read by the reporter.)

X Q. Mr. Peppers, you stated that you handled the crude purchased for the Champlin Company. Will you state the pools from which you were making purchases for the Champlin Company in the year 1926? In which the actual purchases were made?

A. Tonkawa, Watchhorn, Billings and Garber.

X Q. Now will you state whether those pools were—the states in which those different pools are located?

A. All in Oklahoma.

X Q. That was the crude that was purchased for you by the Champlin Company during the year 1926?

A. That is true.

Direct examination resumed.

By Mr. McKeever:

Q. Mr. Peppers, to elucidate a little further, what company was it you said you knew of sales of this no-knock gas in 1926?

A. The Mid-Continent.

Q. Now in reference to its capacity, refining capacity. How does it compare in that Mid-Continent field, in size?

A. The largest plant in the Oklahoma District.

Q. And as I understand you, you told Mr. Marsh they do not advertise the end of their product but instead of [fol. 227] that they have a trade name for their product and sell it under that trade name?

A. That is true.

Q. You have told him, as I understand it, to make the matter a little more clear, that that was a no-knock gas?

A. That is true.

Q. A cracked gasoline?

A. Yes, sir.

Q. And did you say that that brought a better price than the straight run?

A. No, I do not think I said that.

Q. What was the relative market price of the two?

A. Well, they were practically the same. Some of the time with a little advantage on the no-knock gas, but through the distributing stations the gasoline was sold at a three cent premium.

Q. For what reason?

A. For its no-knock value.

Q. That is the no-knock gasoline——

A. Yes.

Q. Was sold at a premium?

A. Yes, sir.

Q. Did that happen during the period of 1926 that you have mentioned?

A. It did.

Q. Now speaking of the hand-book price, how is that made up? Put it this way: Have you got any hand-book price for no-knock gasoline?

A. No, sir.

Q. What specifications is that hand-book price—what do they call it?

A. All the specifications of gasoline ranging from 56-58 to 68-70.

Q. That hand-book price is a composite of the prices of all kinds of gasoline that is put on the market; is that true?

A. It is.

Q. And that gives the average?

A. Yes, sir.

Q. Nation-wide?

A. That is true. United States wide.

Cross-examination resumed.

By Mr. Marsh:

X Q. In reference to this hand-book, isn't it a fact that the hand-book gives the prices by Districts, not nation-wide, for each type of gasoline?

A. Of the United States.

X Q. It gives it for the United States as a whole?

A. Yes, sir.

[fol. 228] X Q. I thought it gave the Mid-Continent price and the California price and the Northeastern?

A. It does.

X Q. In other words, it gives each District?

A. Certainly.

X Q. It doesn't give one price in force throughout the United States?

A. Gives one price in force in the different areas.

X Q. In each area?

A. That is correct.

Direct examination resumed.

By Mr. McKeever:

Q. Mr. Peppers, my attention was called to the fact that I should call your attention to the time in which you say you processed those three cars and took them out to Covington. You told Mr. Marsh it was in the fall of 1927—in February, 1927. I thought you said "fall." We are disagreed on that. When did you say it was and when was it?

A. I don't recall testifying to when I—I misunderstood his question if he asked me.

Q. You testified. Now tell the jury when you took those three cars out to Covington from Enid of that cracked gasoline to attempt to wholesale?

A. Two of the three cars were shipped on November 23rd.

Q. What year?

A. 1926.

Q. All right. When was the other shipped?

A. The following day.

Mr. McKeever: That is all.

(Recess.)

Mr. McKeever: If the Court please, at this time I want to place on the stand, Mr. Koch. His evidence will not refer to the damage feature, but to the other.

The Court: Very well.

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FRED C. KOCH, called for the defendant, having been first duly sworn, testified as follows:

Direct examination.

By Mr. McKeever:

Q. Mr. Koch, have you been sworn in this case?

A. Yes, sir.

[fol. 229] Q. State your name, please, to the jury?

A. Fred C. Koch.

Q. How do you spell that?

A. K-o-c-h.

The Court: You pronounce that Koch, don't you?

A. Yes.

Q. Where do you reside?

A. Wichita, Kansas.

Q. In what business are you engaged?

A. Consulting engineering.

Q. What kind of an engineer?

A. Petroleum, refining.

Q. With what firm are you connected?

A. The Winkler-Koch Engineering Company.

Q. Now explain to the jury what that company does, what your duties are?

A. Well, we design and build oil refineries and special equipment that is used in them; aid in the manufacture of various products.

Q. How long have you been engaged in the kind of engineering in which you are engaged?

A. You mean in the consulting?

Q. Yes, or in any other feature of petroleum refining engineering.

A. Almost seven years.

Q. Were you connected prior to that time with the oil business in any way or the refining business?

A. You mean prior to the seven years?

Q. Yes.

A. No, sir.

Q. Now, Mr. Koch, what has been your education as an engineer?

A. Do you mean in college?

Q. Yes, take that first?

A. Well, a graduate of the Massachusetts Institute of Technology. After leaving there, I worked for the Texas Company.

Q. Well, now, the first was your education. Now give your experience?

A. I worked for the Texas Company.

Q. I will ask you first—you are getting a little ahead of me—when did you graduate?

A. 1922.

Q. Go ahead and give us your experience from your graduation up to the present time?

A. Well, I entered the employ of the Texas Company in Port Arthur, Texas, Refinery, as a research engineer, and I was approximately fifteen months there, and I left the [fol. 230] employ of the Texas Company to enter the employ of the Gasoline Products Company.

Q. That is the plaintiff here, is it?

A. Yes, sir.

Q. What were your duties with that company?

A. Well, I was engaged primarily to design fractionating equipment for them.

Q. How long were you in their employ?

A. About six months.

Q. Then go ahead now and just relate your experiences in chronological order, and what you did?

A. I left their employ, and shortly after I went to England to enter the employ of the Medway Oil Storage Company as Chief Engineer. Then I became the Works Manager. After about seventeen months I came back to this country.

Q. While you were in England you say you became the manager. Was that a refining plant there?

A. Yes.

Q. Manager of the Refinery or Manager of the Operation of the Refinery?

A. Operation.

Q. Operating part?

A. Yes, sir.

Q. Then you came back to America, and then what

A. I went into the general consulting and engineering business with Mr. Keith and Mr. Winkler.

Q. Is that Mr. P. C. Keith, Jr., whose name has been mentioned in this litigation and who is present here today?

A. Yes, sir.

Q. How long were you and Mr. Keith and Mr. Winkler associated together?

A. I think about two months.

Q. Where was that, at what point?

A. Wichita, Kansas.

Q. Mr. Keith then retired from your association, and you and Mr. Winkler are still together?

A. That is right.

Q. How long has it been since you organized that firm in which Keith first went in with you?

A. That was in August, 1925.

[fol. 231] Q. Since that time have you been continuously in business with Mr. Winkler as consulting and constructing engineers of refinery plants?

A. I have; that is right.

Q. What has been your sales experience—I won't say that—your constructing experience—how many plants in that time?

A. I don't remember them all. What kinds of plants?

Q. Any kind that had to do with this oil refining business.

A. Oh, I can't remember them all. Some installations are small, and some are large. Of the larger installations we probably have eighteen; of the smaller installations we have several hundred.

Q. Now, give some idea of the volume of your business in a year, as to cost of equipment, designed and constructed in your supervision?

A. Well, it runs probably three of four million dollars a year—five millions sometimes. First we didn't do so well. The last years we have increased it.

Q. Are you acquainted with H. H. Champlin?

A. Yes, sir.

Q. Are you familiar with the Champlin Refinery and its construction, which is located at Enid, Oklahoma?

A. Yes, sir.

Q. How long have you known that Refinery?

A. Since the fall of 1925.

Q. Did you go there and see it yourself? Were you there?

A. Yes.

Q. What was the occasion of your visit there at that time?

A. Well, we were endeavoring to sell the Champlin Refining Company fractionating equipment for the crude stills.

Q. For the purpose of making it clear to the jury, that fractionating equipment is entirely separate from the cracking units?

A. Well, it is——

Q. It may be a part of them?

A. It may be a part of them, but it is separate, yes, sir.

Q. You weren't there to sell them a cracking plant when you first went there?

A. No, sir.

Q. Now did you undertake to sell them a cracking plant after that first visit?

A. I did later, yes, sir.

Q. When?

A. In January, in 1926.

[fol. 232] Q. In January, 1926. What cracking process were you trying to sell them?

A. The Cross.

Q. Was that, so far as the process is concerned, the identical process which the Champlin Refining Company purchased?

A. I think so.

Mr. Marsh: We object to that line of questioning, Your Honor, because he has not shown that he had any information as to what was being attempted to be sold by anybody else.

The Court: He said that he was familiar with the plant, the one that they bought.

Q. You are entirely familiar with the plant they purchased, are you not?

A. Well, in a general way, yes, sir. I haven't made an examination of the details.

Q. I don't mean in detail, but you know what the Cross Cracking Unit is?

A. I do.

Q. You were selling the same thing, were you not?

A. Yes, sir.

Q. How did you come to be selling the Cross processes?

A. Well, it was by virtue of a license agreement which had been granted to my old employer, in which he was empowered to give——

Mr. Hale: Just a minute. If that is a written agreement, I think we ought to have the written agreement.

The Court: He simply asks how he came to be selling them. I think he may state that he did it by virtue of an arrangement with somebody else. He need not give any terms of the agreement.

Q. Go ahead; who is that old employer?

A. Mr. C. F. deGanahl.

Q. Was he the man under whom you worked when you were in England?

A. That is right.

Q. All right, go ahead now and tell how you came to be presenting this to Mr. Champlin?

A. You want me to tell in detail?

Q. Yes.

A. Well, I knew that Mr. deGanahl had this license agreement with the Gasoline Products Company, and under the terms of that——

[fol. 233] Mr. Marsh: We object to the terms of that license agreement.

The Court: Strictly he can't give the terms of it. I don't think it is important at all. He is simply asked to give the background, the history.

Mr. Hale: It is very important, Your Honor. We propose to put in the agreement itself, which is the best evidence.

The Court: Have you the agreement?

Mr. Hale: Yes.

The Court: Why don't you put it in now?

Mr. McKeever: Let's have it now? I would be glad to have counsel furnish us with a copy.

The Court: It would seem to expedite the matter.

Mr. McKeever: I am not trying now to prove the terms. The Court has stated my position exactly.

The Court: I don't think it is necessary to prove the terms.

Mr. Marsh: We do not want to put it in, but we object to putting the substance of it in through this witness.

The Court: The idea is that he claims to have authority from this man, whose name I cannot spell, to sell the plant, and he was down there to sell it?

Mr. McKeever: That is it.

The Court: That is all you need to say now.

By Mr. McKeever:

Q. Tell the circumstances of how you came to solicit Mr. Champlin to buy this?

A. Well, I was in Enid on the date that Mr. Welling and Mr. Keith were there. It was a coincidence. I was there on another matter, and I was talking to Mr. P. E. Slater, and he mentioned the fact that he would like to have the Cross Unit but that the price was so high. It was not my intention at that time to approach them on the matter even, but I said I might be able to arrange so that you could get it and build it yourself if you would like, and he seemed receptive to the idea, so I went back to Wichita and cabled this gentleman in England and asked for his authority—if he would issue and grant these sub-licenses under his license agreement—and he wired back that he would.

[fol. 234] Q. Mr. Koch, have you the telegram you received from him? (Papers handed to witness.)

A. I don't see it there. I had it, but I don't see it here.

Q. I was thinking it was in that file?

A. No, sir, it is not here.

Q. Well, I thought we brought that along. Anyhow, that is how you became connected with it?

A. Yes, sir.

Q. Now you say that you happened to be there on the date that Mr. Keith and Mr. Harvison were there?

A. Mr. Keith and Mr. Welling.

Q. Which was in the month of January, 1926?

A. That is right.

Q. Did you talk to Mr. Keith that day?

A. Yes, sir.

Q. Did you learn the purpose of their visit there at Enid?

A. Yes, sir.

Q. Now, what time was it that you had the conversation with Champlin that you solicited him to purchase through you this Cross cracking unit?

A. I don't remember the exact date. It was sometime after this, though. As soon as I had gotten authority by virtue of the cable received from England I called him up on the 'phone and told him I could make him a definite proposition on it.

Q. Was that prior to the time that they purchased the cracker from the people that they did purchase it from?

A. Yes, sir.

Q. What proposition did you make to Champlin?

A. I told him that we would build it on a cost plus ten per cent basis.

Q. And what was the cost?

A. Well, our estimate showed labor and materials amounting to $276,000.

Q. And plus ten per cent would be how much?

A. Well, something over $300,000.

Q. Did that include the vapor phase treating towers?

A. No, sir.

Q. That was merely the Cross cracking units of the same capacity that they purchased, was it?

A. Yes, sir.

[fol. 235] Q. Without the treating towers?

A. Yes, sir.

Q. Now, Mr. Koch, what did you do in order to furnish to Mr. Champlin the estimate of cost?

A. Well, I had a complete bill of material and I took this as my basis for arriving at the cost; and I also made some efforts to ascertain whether I could secure a reaction chamber and this identical type of furnace, and I found that I could. Those were the only two points I was in doubt about.

Q. You had the exact knowledge with reference to the rest of the cost, did you, yourself?

A. Yes; I think I did.

Cross-examination.

By Mr. Marsh:

X Q. Mr. Koch, you referred to your employment in Mr. deGanahl's plant in England. Will you state the name of the company?

A. The Medway Oil & Storage Company, Limited.

X Q. Your capacity there was first as Chief Engineer?

A. Yes, sir.

X Q. And then as plant superintendent?

A. Yes, sir. The title was Works Manager.

X Q. While you were there the Medway Company installed a Cross cracking unit? Is that the fact?

A. Yes, sir; they began the installation prior to my arrival, but it was completed while I was there.

X Q. Who were the builders in that company?

A. Charles Heinbach Company.

X Q. Were they acting under the general direction of the Kellogg Company?

A. No, sir: I don't believe they were. They were acting under the direction of,—more under Dr. Walter Cross and Cross-Widdell Engineering Company.

X Q. But you were not the contractor for that plant?

A. Oh, no.

X Q. Did you ever build a Cross cracking plant?

A. No, sir.

X Q. What was the capital of the firm of Winkler & Koch in January, 1926?

[fol. 236] Mr. McKeever: I object.

Mr. Marsh: One of the questions involved here is in comparing the two offers made by Mr. Koch's firm and by the Kellogg Company, and the question of its guarantee of the construction cost; also the guarantee given by Gasoline Products on the performance of the cracking units, and I wish to compare that by showing what was back of the guarantees.

The Court: I do not understand his testimony comprehended that he was to give any guaranty in his offer. What difference does it make, if he didn't make any guaranty, how much he was worth?

Mr. Marsh: I will withdraw the question.

X Q. Did you offer any guaranty?

A. No, sir.

X Q. Can you state, Mr. Koch, with reference to the Cross cracking plant which was completed at the Medway Oil & Storage Company while you were employed by it, what pressure was used in the bubble tower and evaporator, if you know?

A. Oh, forty pounds.

X Q. Now, you refer in your direct testimony to the bill of materials that you used as the basis for your estimate?

A. Yes, sir.

X Q. Upon what was that based, Mr. Koch?

A. Well, the Cross-Widdell Engineering Company had sent Mr. deGanahl a complete set of drawings of the 2000 barrel type of unit which was erected at Point Breeze, also computation of materials for the drawings, which Mr. deGanahl had forwarded to me.

X Q. You spoke also in your testimony about having gone to see Mr. Slater about selling some fractionating equipment?

A. Yes, sir.

X Q. Did you ever sell them the fractionating equipment?

A. Yes, sir.

X Q. When was that installed?

A. That was installed prior to this. I think my understanding was it was just about starting up that time.

X Q. This was 1926, in January?

A. Yes, sir.

[fol. 237] X Q. When was your visit that you first testified to,—the first visit to which you referred to this fractionating equipment and also to the Cross cracking?

A. The first visit on the Cross cracking was the same day that Mr. Keith and Mr. Welling were there.

X Q. Late in January, 1926?

A. Yes. All visits prior to that had nothing to do with that.

X Q. They had had reference to the fractionating equipment?

A. Yes, sir.

Redirect examination.

By Mr. McKeever:

Q. One more question that I think I overlooked. In the proposition made to Mr. Champlin what was the royalty which the Champlin Refining Company would have to pay for the use of the practice of the Cross cracking process?

A. Ten cents per barrel.

Q. The same royalty as was under the contract with the Gasoline Products Company?

A. Yes, sir.

Q. Without a vapor phase treater?

A. Yes, sir.

Mr. McKeever: Now, if the Court please, for the purpose, perhaps, of subsequent testimony, Mr. Marsh has furnished us with a copy of this agreement (indicating) and I would like the privilege of submitting this in evidence.

The Court: Well, you may, if it is admissible, of course. I don't care anything about the time you put in.

Mr. Marsh: What do you want to do with that, Mr. McKeever? Introduce it?

Mr. McKeever: Yes. Introduce it in evidence. We have just been furnished this and there are some things in it I think may later become material, and I think it would take quite a while just now.

The Court: All right. Put it in later. I shouldn't suppose it would be important whether he actually had authority to make the offer or not, so long as Mr. Champlin [fol. 238] thought he had, or had no reason to think otherwise. The question has not been raised that he had any authority, has it?

Mr. McKeever: I want to offer this as the best evidence of that proof, for fear that I might lose that right. But under the Court's statement that it may be put in later if it becomes material I will not offer it at this time.

The Court: The way it stands now, he says he thought he had authority. That is all there is to it.

Mr. McKeever: Yes. Now, if the Court please, I am done with this witness.

The Court: Well, there are no more questions, are there?

Mr. McKeever; No, sir. That is all of this witness.

The Court: That is all.

(Witness excused.)

Mr. McKeever: Now, at this time, we are ready for Mr. Leverton who I think will conclude our testimony. Well,—just a minute, if the Court please. (Confers with counsel.) Well, I want to recall Mr. Champlin, come to think about it.

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Mr. H. H. CHAMPLIN, recalled by Mr. McKeever, testified as follows:

By Mr. McKeever:

Q. Now, Mr. Champlin, during the period—first, I will ask you this: In your discussion with Mr. Keith with reference to purchasing Cross cracking units and making a finished product for your plant, was the gasoline termed as "no-knocks" gasoline discussed?

A. The finished gasoline from the cracking plant was. Yes.

Q. What kind of gasoline were you to make out of this plant when you got it?

A. It was to be—would be—a high percentage of no-knocks compounds or qualities.

Q. Was that discussed with Mr. Keith?

A. Yes.

Q. Now what was your reason for wanting to manufacture that kind of gasoline?

A. There was a demand—a growing demand—for it, that we were not able to supply, and we were losing some of our trade because we couldn't supply it.

[fol. 239] Q. Would you say that the demand was sufficient to occupy your plant during the period from the time the crackers were completed up until—to occupy your plant at its full capacity—from the time the cracking plant was completed up until the time you did get a tower?

A. Yes.

Q. Now, Mr. Champlin, state whether or not during that period there was a demand for no-knocks gas, or gasoline, over other qualities or kinds?

A. Well, there was more straight run gasoline manufactured all the time than there is today; but there is a demand for this cracked or no-knocks gasoline.

Q. Does that ever command a premium over the straight run?

A. Yes.

Q. Was that true during the year 1926?

A. Yes.

Q. So that if you could manufacture a product under the terms of the contract with the Gasoline Products Company you could have manufactured a quality of gasoline which sold at a premium over the straight run. Is that right?

A. Of course that would be more or less a matter of conjecture, but from what I know I am sure that we could have manufactured that much no-knocks gasoline. To say what we could have done, why, you know that——

Q. Well, I am asking you this now: If there was a sufficient demand for it in the trade, that that plant could have run at full capacity?

A. Easy. Yes.

Q. And the quality of gasoline which that plant would have manufactured was a quality of gasoline that did sell at a premium?

A. It did with some of the manufacturers in the mid-continent field. When I say a "premium," I mean a premium over the U. S. Motor Gasoline, which is really the standard in quantity and quality marketed.

Mr. McKeever: That is all.

The Court: That is all.

(Witness excused.)

Mr. McKeever: Now, if Your Honor please, Mr. Leverton, after consulting with counsel last night at some length

[fol. 240] on that item, asked leave to make a recalculation. We had the sheets all made, but this change—while only a small change—makes it necessary to change all those, and the stenographers aren't experienced with making those, and we agreed to give them to the counsel on the other side; and we feel that if Your Honor will now adjourn, at this point, until after lunch, we will have them ready and be able to go ahead with them then.

The Court: All right: You may be excused until two o'clock. But I want to see counsel at the bench a minute.

(Suspended until 2:00 o'clock, p. m.)

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Thursday Afternoon (April 25, 1929, Two o'clock)

G. E. Leverton, called for the defendants, having been sworn by the Clerk, testified as follows:

Direct examination.

By Mr. McKeever:

Q. State your name?
A. G. E. Leverton.
Q. Where do you live?
A. Enid, Oklahoma.
Q. What is your business?
A. General auditor for the Champlin Refining Company.
Q. How long have you been engaged in that kind of work?
A. In auditing and accounting?
Q. Yes, auditing and accounting.
A. Since 1913, with the exception of a couple of years, but in 1918 and 1919.
Q. What has been your experience?
A. Why, I had five years in banking and about one year, I should say, retail merchandising business, and three years public accounting, and with Champlin Refining Company since May, 1923.
Q. Before you entered the Champlin Refining Company, what was your employment?
A. Public accounting.
Q. Do you call yourself the auditor of the Champlin Refining Company, is that your proper designation?

A. Yes, sir.

[fol. 241] Q. As such auditor is under your supervision all of the auditing of that company?

A. Yes, sir.

Q. Mr. Leverton, I will ask you if you have developed for us the calculation of the operation of the Cross cracking plant?

A. I have.

Q. And reduced that all on one sheet, haven't you?

A. Yes, sir.

Q. In making your calculations in that regard, in determining the item of expense of operation, where did you obtain that item?

A. The superintendent of the refinery, Mr. E. J. Slater, has supplied me with the expenses—with the amount of the expenses for one month in the operating of the cracking plant.

Q. In your calculations you have used that as a basis?

A. Yes.

Q. Is there an additional item that comes under the expense that is not furnished by him?

A. There is an item of royalty to the Gasoline Products Company for cracking, an item for compensation insurance, based upon the payroll, and an item that I don't know whether he includes it in his testimony or not; it isn't included on my sheet, which is the clay in the treating towers.

Q. Now are those items within your own knowledge so that you can make a computation?

A. The compensation insurance and the royalty are within my knowledge. The clay for the towers is based upon one exhibit and Mr. Gray's deposition in this case.

Q. That is the deposition that is filed in this case but not read yet?

A. I don't think it is read.

Q. That is the deposition filed here in behalf of the plaintiffs?

A. That is my impression.

Q. Now, Mr. Leverton, in arriving at the price of the finished product in making your calculations how do you determine that?

A. I arrived at that price from what is known as the hand-book which is a publication of the National Petroleum

News, giving the prices of the various refined products over—well, by weeks and by months.

[fol. 242] Q. And is that the accepted method used and recognized in the petroleum trade and oil business?

A. Yes.

Q. Have you those hand-books with you for the years 1925 and 1926 and 1927? Or 1925 and 1926. Yes, and 1927?

A. I have them for 1926 and 1927. Not for 1925.

Q. You have them for the period covering the time from the time the Champlin Refining Company finished the installation of its Cross cracking unit up until the time it finished the installation of its vaper phase treaters?

A. Yes, sir.

Q. And have you used that period from the hand-book to make your calculations?

A. I have.

Q. Have you the hand-books available for the counsel on the other side if they desire to make an examination of it?

A. I have.

Mr. McKeever: I do not care to offer it in evidence.

(Two books produced by witness and handed to counsel for the plaintiffs.)

Q. Now Mr. Leverton, you state what period of time your calculations cover?

A. It covers from the period from September the 20th, 1926, until the completion of the treating plant which was really divided. One tower—that is, one unit of the cracking plant——

Q. The cracking plant or treating plant?

A. Of the cracking plant, was connected to the treating towers on February the 8th, and the other unit was connected on February 23rd.

Q. Nineteen hundred and——

A. Twenty-seven.

Q. Now will you refer to your calculations, and if the Court please, after using this we would like to have it made a part of the record for the convenience of everybody concerned.

The Court: Yes, I think it should be.

Mr. Jones: Does the Court want a copy?

Mr. McKeever: That is right. We will have a copy for the Court.

A. I don't have another copy.

[fol. 243] Q. We have an extra one here some place. How many have you got?

A. I have only got one. The stenographer didn't get through and only got five completed. There will be several more.

By Mr. Jones:

Q. When?

A. About five o'clock.

Q. Now Mr. Leverton, taking your calculations, what is the first item shown on this sheet?

A. Guaranteed recovery of gasoline in barrels, 65% of——

Q. All right. All right. Go ahead.

A. Of the fresh gas oil.

Q. Where do you get the 65%?

A. That is taken from the guaranteed performance given to the Champlin Refining Company by the Gasoline Products Company at the time of the purchase or in connection with the purchase of the Cross cracking plant.

Q. You take it from the guarantee contract which is offered in evidence here?

A. Yes.

Q. All right. Now then how have you made your computations here with reference to dividing it into units of time?

A. By months.

Q. Why did you use the months instead of from day to day?

A. Well, we have average prices in the hand-book for the months, and I think that is about the only——

Q. You have used those average prices in the hand-book and averaged them through the month. Is that the approved method of making such calculations?

A. That will, I think, produce the same result as if we took the operation day by day.

Q. And save a great deal of time in developing the testimony too?

A. Yes.

Q. Now all right. Follow your first item which you started on and explain to the jury from month to month what your first item shows? Remembering that the jury have not the figures in front of them. We could not give each one a key to this account so make it as plain for their information as you can.

A. The gasoline recovery of 65% must necessarily be based on the fresh gas oil of which it is 65%, and the fresh [fol. 244] gas oil to be used or consumed by the Cross cracking plant is fifty-four thousand barrels per month.

Q. Where do you get this fresh gas oil? Where does the Refinery get the fresh gas oil?

A. The refinery manufactures fresh gas oil in the skimming plant.

Q. That is right. Now go ahead?

A. And the 54,000 barrels capacity is the capacity allowing for what is known as shut-down and clean-out time, three shut-down or clean-out periods per month, which brings it down to 54,000 barrels per month, and 65% of the 54,000 barrels is 35,000 barrels of gasoline.

Q. Now where do you get the 54,000?

A. 54,000 is the capacity of the plant for a month, allowing for the shut-down periods.

Q. The capacity of the cracking units, the two two-thousand-barrel Cross cracking units?

A. Yes.

Q. All right.

A. And the gasoline, or 35,100 barrels per month, I have converted into gallons. I will say that a barrel as used in the oil industry is 42 gallons, and the 35,100 barrels amounts to 1,474,200 gallons per month. And to that quantity of gasoline I have applied the hand-book price for U. S. Motor Gas Oil, which is the accepted standard, to arrive at a value of the gasoline for each month. The first month or first period covers from September 20th to 30th, which is a third of a month, and 491,400 gallons of gasoline would be produced in a third of a month, which at the weighted average value in the hand-book——

Q. Explain what you mean by weighted average before you go on to that?

A. The weighted average might be explained in this way, that, if there are two or three prices that prevail during the month, it would not be fair to say or to add the three

prices and then divide that by three. The time for which each price is maintained enters into the computation of the average for the month. For instance, you might have one price for 20 days and a lesser price for three days, and a still lesser price for seven days.

Q. Is the hand-book price the weighted average?

A. The hand-book price is the weighted average.

[fol. 245] Q. Referring to that afterwards, instead of weighted average, use the words "Hand-book price." Then we will drop out any confusion about it.

A. Yes.

Q. Go ahead?

A. 491,400 gallons of gasoline produced during the third of the month of September at the hand-book price of 10.3c——

Q. Per what?

A. Per gallon. Had a sales value of $50,614.20. For the month of October there would be 1,474,200 gallons of gasoline produced, during which month the hand-book price was 9.95c; in fact it is 9.953, carried out three places, for October.

Q. Almost ten cents?

A. Yes.

Q. Per gallon?

A. Per gallon. Which had a value—which resulted in a value for the total yield of gasoline of $146,727.13. A like amount of gasoline yield would result for November, December and January, in 1,474,200 gallons——

Q. Each month?

A. Each month. In November the hand-book price was 9.2c, which results in a value of $135,626.40, for the value of the gasoline for that month. December the value is 9.34c, or 9.344.

Q. Per gallon?

A. Per gallon, resulting in a value of $137,749.25 for December. January, the same quantity of gasoline at the hand-book price of 9.1c per gallon results in a value of $134,152.20. For the month of February, one still, or one-half of the unit, or one-half of the plant, I should say, or one unit, was not in operation for seven days, or until the 8th of the month. The other unit was not in operation for 22 days, or until the 23rd of the month.

Q. That is, the Vapor Phase Treater wasn't applied?

A. Yes. That results in an average of 14½ days for the complete unit or complete plant.

Q. For the month of February?

A. Yes, which I have computed on the basis of a half a month, and will result in 737,100 gallons of gasoline, at the hand-book price of 8.74c, which results in a total value for the period in February of $64,444.65. Over the entire period [fol. 246] there would have been produced 169,650 barrels, which is the equivalent of 7,125,300 gallons. And the total values for that month, adding the values that I have given for each of the periods, or each of the months, is $669,313.83.

Q. What kind of a product is that?

A. For gasoline.

Q. Gasoline?

A. Yes.

Q. All right, that disposes of your calculation on the gasoline product?

A. Yes.

Q. What does your next calculation cover?

A. Fuel oil.

Q. Explain to us your calculation on the fuel oil?

A. The fuel oil is computed on the basis of a 25% recovery from the fresh gas oil, which percentage is also taken from the guaranteed performance in this case, and 25% of the 54,000 barrels of gas oil per month is 13,500 barrels per month, and, inasmuch as gas oil is sold by the barrel, I have not converted it into gallons as I did in the case of gasoline.

Mr. Jones: Inasmuch as the fuel oil is sold by the barrel.

A. Fuel oil is sold by the barrel, and to the yield of fuel oil I have applied the hand-book price for fuel oil, which for September was one dollar and twenty-eight and three-fourths cents.

Q. Per barrel?

A. Per barrel, yes. And there was a third of a month of September for operation, or a yield of a third of a month, which is only 4,500 barrels, having a value of $5,793.75. For the whole month, of October, November, December, and January, we have the 25% yield of the total fresh gas oil, which is 13,500 barrels.

Q. Per month?

A. Per month. October hand-book price was one dollar and twenty-four and four-tenths cents, resulting in a value of $15,500 for October fuel oil. November price was one dollar and nineteen and a half cents per barrel, or $14,937.50, for the total yield. December hand-book price was one dollar and seventeen and two-tenths cents per barrel, resulting in a value of $14,650 for the month's yield. January hand-book price of one dollar and sixteen and three-tenths cents results in a value of $14,537.50. For the month of February the same is true with reference to the time as [fol. 247] was stated with reference to gasoline. That took half a month or 6,750 barrels at a price of one dollar and sixteen and three-tenths cents, a total value of $7,850.25. Adding the values of the fuel oil for each of the months, we have $73,269 for fuel oil.

Q. That covers the period from what date? Was that in September?

A. September 20, 1926.

Q. Until the month of February, 1927?

A. Yes.

Q. Including that part of February as you have averaged it?

A. Yes.

Q. All right. Did you add together now the total value of the products, that is, the gasoline and fuel oil, as you have computed them? Have you the totals for that?

A. I did.

Q. Give the jury what the total value of the two products amounts to, that is, you can give it in months and then in total, of the 65% recovery of gasoline and the 25% of fuel oil?

A. The total value of both products for the 10 days of September is $56,407.95. For October $162,227.13. For November $150,563.90. For December $152,399.25. For January $148,689.70. For February $72,294.90. Total for all months $742,582.83.

Q. Now that is operating the plant on full capacity except the shut-down time as you have explained, for the period as indicated by the head of your sheet here, September 20 to February 23?

A. Yes.

Q. Or the half of February. All right. Now take your next item there and explain that to the jury, where you have charging stock?

A. Well, the gas oil, fresh gas oil——

Q. That comes from the skimming plant?

A. That comes from the skimming plant to the cracking plant. I have called it charging stock, and the word "fresh" should be ahead of the words "gas oil"—"fresh gas oil"—indicating that it is not a recycled or re-run, which is 54,000 barrels per month.

Q. Why do you put that word guaranteed in there?

A. Well, that is the capacity, the rated capacity of the plant, 2,000 barrels per day, of fresh gas oil, or 4,000 barrels through-put.

[fol. 248] Q. Is that the guarantee under the contract?

A. I don't know whether the 54,000 barrels is specified in the guarantee.

Q. But that is the capacity?

A. That is the capacity.

Q. Go ahead?

A. For September, running one-third of a month, would require 18,000 barrels of gas oil, which valued at the hand-book price is one dollar, eighty-one and one-tenth cents per barrel, which makes a total value of the gas oil used in the month of September or in the ten days of September, in order to make the finished products that we spoke of a while ago, required 18,000 barrels of gas oil at the hand-book price one dollar, eigthy-one and one-tenth cents, or a total value of $32,606.28.

Q. For September?

A. For September. For October would require 54,000 barrels of gas oil at the hand-book price of one dollar, eighty-one and one-tenth cents, or a total value for the gas oil of $97,818.84. The same quantity of gas oil for November at the hand-book price of one dollar, eighty-one and one-tenth cents is $97,796.16 total value. For December the hand-book price was one dollar, eighty-eight and three-tenths cents, making total value of the 54,000 barrels of gas oil of $101,697.12. For January, the hand-book price of one dollar, eighty-four and two-tenths cents, results in the total value of $99,519.84. For one-half month in February, 27,000 barrels at a value of one dollar, eighty-one and one-tenth cents, the hand-book price for February, makes a total value of the gas oil $48,903.75; or during the entire period there would have been consumed 261,000 barrels of gas oil, having a total value, valued by months, of $478,341.99.

Q. Now, Mr. Leverton, did you compute the gross profit from that operation?

A. I did.

Q. Will you give us that?

A. The gross profit is the difference between the sales value and the cost of the gas oil. The sales value for September of $56,407.95, and the total sales value of the gas oil consumed was $32,606.28, resulting in a gross profit of $23,801.67; and for October, computed in the same way, deducting the value of the gas oil consumed from the sales value of the products results in a gross profit of $64,408.29; [fol. 249] and a like computation for November shows a gross profit of $52,767.74. December shows a gross profit of $50,702.13. January a gross profit of $49,169.86. February, $23,391.15. The total value of the gas oil consumed for the period, amounting to $478,341.99, deducted from the total value of the products for the same period, which amounted to $742,582.83, results in a gross profit for the period of $264,240.84.

Q. Now, then, how do you arrive at your net profits?

A. By deducting from the gross profit the amount that it would have been necessary to spend to produce the products; that is, the gasoline and the fuel oil.

Q. Have you the figures and computations on your sheet for that?

A. I have.

Q. You will now give us that?

A. The first item I have is direct expenses per month——

Q. What do you mean by that?

A. (Continuing): Which is the expenses supplied to me by the superintendent of the refinery, which consist of labor, fuel, electricity, steam, water, gasoline, fuel, amounts to $6,495.44 per month.

Q. Now, Mr. Leverton, if you desire, unless there is objection, we may shorten a little, if you want to, make the totals on those expenses, and inasmuch as we are going to put the sheet in the record anyhow you do that?

A. The total direct expense based on the expense computation supplied by the superintendent for the entire period amounts to $31,394.63.

Q. Now, what is your next item?

A. Compensation insurance.

Q. Explain to the jury what that item is, and why that has to be deducted?

A. The compensation insurance is an insurance that is required of all industries or all employers of men, that they must carry insurance to protect an injured employe.

Q. That is required by the laws of Oklahoma?

A. That is required by the laws. And the rates for that compensation insurance, that is, the rate which the insurance companies may charge for the insurance, is fixed by the State Insurance Board or Insurance Commission- [fol. 250] ers I believe they call them; and the insurance rate—compensation insurance rate applicable in Oklahoma for refineries, and all classes of labor come under the one group at the rate of $3.16 per one hundred dollars payroll. Therefore in computing the compensation insurance in this case it is based upon the labor item of $2,218.50 per month, which the superintendent of the refinery has shown as the necessary labor to operate the plant, and computed at the rate of $3.16 per one hundred dollars of payroll amounts to $338.82 for the period.

Q. Now, then, what is your next item of deduction?

A. The clay for the treating towers, which is computed on the basis of five dollars per thousand barrels of gasoline. The five dollars per barrel was obtained from the exhibit of the Gray deposition, and five dollars per barrel on the 35,100 barrels of gasoline yield in the first part of the schedule amounts to $175.50 per month, or $848.25 for the full period.

Q. What is the next item?

A. The next item is the royalty to be paid to the Gasoline Products Company for use of Cross cracking plant.

Q. Is that royalty to be paid, in what we call the license agreement? Is it attached to the declaration that is offered by the plaintiff here?

A. Yes, sir.

Q. Will you give the royalty to the Cross plant? Read them month by month and then give us the total?

A. $3,600 for the third of a month in September. $10,800 for October. A like amount in November, December and January; and half a month or $5,400 to February, making total of $52,200 for the entire period.

Q. The the expense of operating the Cross cracking units under the license agreement from the month of September 20th until the average in February, one-half a month, would be that total of $52,200 for the approximate five months?

A. The royalty.

Q. I mean the royalty due the plaintiff here, the Gasoline Products Company?

A. Yes.

[fol. 251] Q. What is your total expense?

A. The total expense for the entire period——

Q. You may make it the total for the entire period?

A. Is $84,781.70.

Q. That would be the gross expense. Now reduce that from your gross profits and give us the result of the net profits for the period from September the 20th, 1926, up to and including the first half of February, 1927?

A. We had a gross profit of $264,240.84, from which is to be deducted the total expense of $84,781.70, leaving a profit after cost of producing——

Q. Would you term that net profit?

A. Yes; of $179,459.14.

Q. Yes. Now I will have the reporter mark the tabulation sheet and identify it as Defendant's Exhibit 61, that it might be offered in evidence and made a part of the record for the benefit of Court and jury and counsel,

Mr. Marsh: You understand, sir, that all this tabulation and all this testimony is subject to the same objection that we have discussed before?

The Court: Yes.

Mr. McKeever: Yes. I so understand it. Now that finishes the tabulation, if the Court please, and I have another one now. I am keeping them separate and make these remarks in the record for that purpose. It is suggested by Mr. Jones that the jury might have this tabulation.

The Court: Well, if they take the first one and look at it while you are talking about the second one, they quite likely will be mixed up about them.

Mr. McKeever: Yes. The second one is simple. Well, I will give it to the foreman and they can use it when their

time isn't otherwise occupied. (Hands paper to jury and to counsel.)

Mr. McKeever: Now, I will hand these to the jury. (Hands another paper to jury.)

Mr. Jones: You will have copies of the other for the jury when it is done, won't you?

Mr. McKeever: Yes.

[fol. 252] Q. Now, Mr. Leverton, I will ask you if you have made another calculation in connection with—or tabulations—in connection with this; and what they are?

A. I have computed the interest on the profits after the cost of producing concerning which I have just testified.

Q. That is, now, the total net profits that you have given to the jury?

A. Yes.

Q. On that you have computed the interest?

A. Yes.

Q. From when?

A. From thirty days after the date that the profit should have been earned, to February 25, 1929.

Q. Then that would be computed up through 1927—what date?

A. Well, I computed—the first item of interest starts on October 25, 1926.

Q. Have you divided that into months? Have you divided your computation into months?

A. Well, I have the time.

Q. That is what I mean?

A. Yes.

Q. Now why did you do that? And how?

A. The time that elapsed from the—from October 25, 1926, to February 25, 1929, is merely computed; that is all.

Q. Well, under the customs of the trade and the payment—or the recovery of profits—when would your interest commence? What you had earned in the first month you would commence interest from when?

A. Well, I compute that from thirty days from the time the profit would have been earned.

Q. Now, why do you do that?

A. Because our terms of sale—the longest term on which we ever sell gasoline—is thirty days. Therefore I have

computed interest after thirty days from the date at which these profits should have been made.

Q. Then this computation is in accordance with the custom of your company with reference to the collection for the sale of your products?

A. Yes.

Q. It is open for thirty days, and after that it is due?

A. Yes.

Q. Now, then, give the computation to the jury?

A. Well, the period from September 20th to 30th, 1926, [fol. 253] the profits are $17,954.64, upon which I computed interest from October 25th, which is the average date between the beginning and ending of the period; the time elapsing is two years, six months and two days from October 25, 1926 to April 25, 1929. The interest at six percent amounts to $2,699.10.

Q. Up to when?

A. Up to April 25, 1929. For the October profits of $46,867.25, upon which interest at six per cent had been computed from November 15, 1926, a period of two years, five months and eleven days, the interest amounts to $6,903.95 to April 25, 1929. The November profit: That is, the November, 1926, profit of $35,226.70; interest computed from the 15th of December amounts to $4,937.52. The profits for December amount to $33,161.09, upon which interest of six per cent has been computed from January 15, 1927, or two years, three months and one day, and amounts to $4,482.21. The profits for January, 1927, amounting to $31,628.82, with interest computed from February 15, 1927, two years, two months and one day, amounts to $4,116.68. The period from February 1st to 23rd, profit of $14,620.63, interest computed from March 12, 1927, or two years, one month and thirteen days, interest amounts to $1,858.72; making a total amount of loss of $179,459.14, upon which interest to April 25, 1929, amounts to $24,998.18.

Q. Now, the total interest is $24,998.18 from the time the interest would accrue within the period between which the cracking plant was finished and the treaters were finished, up to this twenty-fifth day of this present month?

A. Yes.

Q. Mr. Leverton, have you got a tabulated computation of the cost of the chlorine plant? The erection of it, I mean?

A. I believe I have.
Q. Will you produce that?

(Witness leaves stand to obtain paper.)

Mr. McKeever: Now, if the Court please, this, of course, finishes the separate item, that is the interest item, and I want to ask the reporter to identify this instrument or [fol. 254] tabulation as Defendant's Exhibit 62, in order that it may be offered in evidence and become of record, and I so offer it.

The Court: Very well.

Mr. Hale: It appears to me, if Your Honor please, that in addition to our fundamental objection to this exhibit, there is a further objection with respect to this interest tabulation; that it appears, so far as we understand it, to assume that this gasoline as cracked and treated as it would have been cracked and treated according to their hypothesis, would have sold right off bang, as soon as it came from the plant; which is not a sound assumption.

The Court: That same objection applies to his testimony. This simply is a tabulation of his testimony given to the jury for convenience. Not especially differing from his testimony, but in tabulated form showing in substance his testimony.

Mr. Hale: I understand that his testimony relates simply and establishes the accuracy of certain mathematical computations which, of course, we don't gainsay at all.

The Court: This is all this tabulation is introduced for: Simply to show the mathematical calculations. For convenience, the same as that other tabulation. I don't think that changes your rights any. There is no admission on your part that those figures should be used. You simply think that they are probably mathematically correctly figured, that is all.

Q. Now, Mr. Leverton, have you the records of your office that show the total cost of the erection of the vapor phase system treating tower which was installed right ready for operation in the month of February, 1927?

A. I do.

Q. Have you the different invoices and itemized costs?

A. I have.

Mr. McKeever: Now, unless they are called for by counsel, we will only give the totals on that, and we will exhibit them to counsel and not encumber the record with all those invoices.

The Court: Now, you are through with the matter of profits?

Mr. McKeever: Well, just a second, Judge, now. Yes. For the purposes of the record, in answering the Court's [fol. 255] question, with this witness we are now through on the computation of the loss of profits.

The Court: Going over on another branch.

Mr. McKeever: Now, the item that I want to put into the record now is the cost of the vapor phase system treating tower, which we have erected, as the evidence has already shown.

Q. Now I was a little in error in saying that it was finished in February. The third tower, we have evidence to show, was in March, but it is the cost of the three towers which composes the vapor phase plant. Now without an itemized statement, without incumbering the record with the invoices and items, will you give the jury and the Court the total cost?

A. $26,751.18.

Mr. McKeever: I want to ask the witness a question in reference to another tabulation. Not for the record. (Confers with witness.) If the Court please, there are two more items that Mr. Leverton did not get time to tabulate, but they are short and simple, and I understand that he is to be excused now until they take up the time and I will have him tabulate those.

The Court: What are these other items, what do they relate to?

Mr. McKeever: Well, they would be separate items, without stating what application they have at this time, they would be separate items from what has already been introduced. One of them would be the cost of building the equipment which produces the chlorine treatment, which operates to give it the chlorine treatment, and the other would be the cost of the chlorine treatment with the capacity plant over the life of the plant—over a term of the life of the plant. As to the application of it, we will bring that to the Court's attention later.

The Court: You are through with this witness at present?

Mr. McKeever: Yes, sir; I am through with this witness, and under agreement with counsel now he may stand aside, and they desire to——

The Court: He may be cross-examined later.

[fol. 256] Mr. McKeever: Yes. Of course with our right to put in this other.

The Court: With the exceptions mentioned, do you close?

Mr. McKeever: You mean the entire case?

The Court: Yes. Your direct.

Mr. McKeever: Well, I do on this witness, except with the reservation—it is only on this witness—I don't mean to agree to that—I did want to supplement this with some other testimony if I desired.

The Court: Have you any other witnesses to call?

Mr. McKeever: Well, I think not, but it did occur to me that there were one or two points that I might want to supplement by recalling because of the application of these figures. That is all.

The Court: You have another witness?

Mr. McKeever: No, no other new testimony that will develop.

The Court: Hadn't you better open your case? You had better open your case then.

Mr. Hale: May it please the Court, Mr. Foreman and Gentlemen: I am afraid you are already beginning to think it that a long sometime ago that when I appeared before you at the outset of this case to explain the situation of the parties, but I assure you that all the parties are anxious to present——

Mr. McKeever: Do I understand now under the rule he opens, or did he open when we first started in?

The Court: When I said "open" I intended in my mind—you are the plaintiff. You are the plaintiff on this counter claim, of course.

Mr. McKeever: He made a rather full statement in the beginning. I am not objecting.

The Court: He is entitled to state his position on the counter claim.

Mr. McKeever: All right.

Mr. Hale (Resuming): I assure you that all parties are anxious to present this rather large amount of testimony as [fol. 257] simply and as rapidly as we possibly can. Now I

stated when I opened at the outset of this case that there was due to us from the defendant, the Champlin Refining Company, the sum of fifty-four thousand eighty-seven dollars and some odd cents, and I said at that time that I anticipated no controversy about that amount. The events have justified me in that statement. The defendant has very frankly confessed both by his formal plea and answer, and by his stipulation that it is indebted to us in this amount, and the controversy arises, as I have been anticipating, over this counter claim on the part of the defendant, and with respect to this counter claim the defendant assumes the role of the plaintiff and complains of a breach of an alleged contract with our company, the Gasoline Products Company, for furnishing the Champlin Refining Company with, as they say, three Cross Vapor Phase System Treating Towers. This claim is of unliquidated character, as lawyers say. That is to say, the amounts which they allege for the damage sustained by them for the breach of this alleged contract is not any fixed sum, as our claim against them, but of course they expect to reduce it to dollars and cents by the complicated—in fact, I might say, very complicated computations which have been presented to you gentlemen to-day. Now with respect to this counter claim, I may say at the outset that our position is simply this: That there was no contract entered into between the parties to this suit for the furnishing the Champlin Refining Company by the Gasoline Products Company of these three Cross Vapor Phase Systems Treating Towers, and in an orderly and proper manner we wish to present the facts to you, and show you the substance of the case, and we go further and say that if you should not share that view with us, and should be of the opinion that there was such a contract, and that such a contract was broken through some fault of our clients, there wasn't any damage sustained by the Champlin Refining Company by such a breach, even if there was a breach. That is, if the Champlin Refining Company, and I think I am right to use Champlin, and the Champlin Refining Company as pretty well interchange-[fol. 258] able terms, because it is really Mr. Champlin's company, suffered any loss in this connection, it is their own fault.

Now before I go further, I think I might do well to recapitulate the identity of some of these persons and some of

the corporations which you heard talked about in this case. The Champlin Refining Company, of course that is the defendant company, and there isn't any confusion or question which can arise in your minds about that. The Gasoline Products Company, the plaintiff in this case, is what I am going to call a licensing company. It licenses the Cross cracking unit or licenses perhaps I should say the use of those units by certain licensees, and under letters patent. That is the only business of the Gasoline Products Company. It derives all its living through royalties for the use of this property. It buys nothing; it sells nothing. It manufactures nothing and constructs nothing. It is purely a licensing concern, and it does not license anything, as I understand it, except this Cross cracking process for the cracking of gas oil. Now the M. W. Kellogg Company is a totally distinct company, and on the other hand is a constructing company. It does various types of construction work, particularly, I think, construction in connection with the petroleum business, and while it is separate and distinct from the Gasoline Products Company in every way, it is related to it in two particulars. I mean related in a business way. Not legally. But in a business way. It constructs a good many of the Cross cracking plants for licensees of the Gasoline Products Company by independent contracts, of course, with those licensees. It does not construct by any means all of them. I don't understand that it has any monopoly on that job. Far from it, but they do construct a good many of these Cross cracking plants. It is related or was at this period at any rate, related to the Gasoline Products Company in one further particular, in that it was the agent of the Gasoline Products Company for soliciting licensees for the Cross cracking plants. In other words, it was doing what you might call a salesman's job for the Gasoline Products Company, although technically of course the licensing of this property is not a sale. It was doing [fol. 259] salesmen's work for the Gasoline Products Company.

Now then there lived in Kansas City, and still live there today, for that matter, two brothers by the name of Roy and Walter Cross, who are chemists and engineers and inventors, and petroleum—technologists I think is the technical phrase. As petroleum technologists these gentlemen have a national reputation, and I think there is no question

about their ability and capacity and distinction in this field. They or one of them, I am not sure which, but I think both of them together, were the inventors of this Cross cracking process, and they also invented this Cross vapor phase treating system of which there has been so much testimony. Now they had two companies. One of them was the Cross Engineering Company which was handling their business as consulting engineers and doing other business I think of an allied character for the Cross brothers. That Cross Engineering Company I think was organized about the first of 1926, and there has already been testimony to the effect it was sold out to the M. W. Kellogg Company I think about June, 1926, so its existence was a brief one. Only about six months.

But during the period that is most in question, the period from January to June, 1926, the company was in existence, and its chief managing head, whatever you may be pleased to call him—I do not know his technical title—was P. C. Keith, Jr., about whom you have heard a great deal and who is here in the room and who will testify.

Now the Cross Engineering Company, among other functions, did have an agency from the Kellogg Company to sell or to procure licensees for the Cross Process in what is called among the oil men the Mid-Continent Field, which, as I understand it, is Oklahoma and Indian Territory and that territory around there.

There was still another corporation—I think quite a small corporation—which the Crosses had organized, called the Cross Development Corporation, which held the title to a number of patents on inventions of the Cross brothers, but was not in business in any commercial sense.

[fol. 260] C. H. Welling, I think the testimony will show, was the Vice President of the Gasoline Products Company and was also a Vice President of the Cross Development Corporation, but the companies are entirely distinct, and the only connection between them, apart from the fact that they had at least one common officer—there may have been more I don't remember—they are entirely distinct entities—but they had this in common, of course, that they both claimed what we might call an intellectual descent from the Cross brothers, because the Gasoline Products Company was interested in the Cross cracking process, which the

Cross brother- has invented, and the Cross Development Corporation held title to other Cross patents.

Now, so much for the individuals and the corporate entities which are involved in this case.

The scene of this story opens, if we except certain visits of Harcourt and Keith and others to the Champlin Refining Company in the latter part of 1925 and early in 1926, for the sake of discussing the sale to the Champlin Refining Company of cracking machinery or a cracking process—if we except those early negotiations, which are not, I think, particularly important in this case, although, of course, they form a background—the scene of this particular story opens in Enid, Oklahoma, in Mr. Champlin's office on January 26th or 27th—I am not quite sure which—1926, when there were present Mr. Champlin, as representing his company, Mr. Welling, and Mr. Keith.

Now, Mr. Keith and Mr. Welling will be here, and they will testify what occurred at that conference. Mr. Keith will testify to what occurred at the further interviews with Champlin, at which he was present.

Mr. Harvison and Mr. Keith went again to Enid, and talked to Mr. Champlin and Mr. Slater, on February 6, 1926, at which time three unsigned contracts were left with Mr. Champlin, and at which time also Mr. Keith left with Mr. Champlin this letter about which there has been so much talk. Mr. Harvison, as I say, will testify along with [fol. 261] Mr. Welling, and they will tell you precisely what happened on all these occasions, and I think that in some particulars, at any rate, their testimony will differ from that of Mr. Champlin. I think you will see by the time this story is told that their testimony is perfectly correct and must be correct in order for the facts to dovetail together at all.

Now, while it is not my function, not my business, not your business either, to be troubled with questions of law, let me say simply this, that in our judgment all the talk between these gentlemen which led up to the signing of the three contracts, was negotiations merely, and that the particular point was not so much what was said at this conference or that but what the parties finally agreed upon.

Now the offer which is contained in this letter of February 6, 1926, was never accepted formally by Mr. Champlin

or by anybody representing his company, and he does not so contend, and of course we don't so contend.

Mr. Champlin goes further and says that not only was that offer never acepted, but it would have been an unacceptable offer in any event, because that was an offer for one of those treating towers and not for three, which is what he says he wanted.

Mr. McKeever: If the Court please, isn't he a little outside of his province in making that statement to the jury. He is now placing a construction on the evidence already produced by us.

The Court: Of course, it is difficult to draw the line sometimes between a proper opening and a closing argument.

Mr. McKeever: My understanding is, and I might be guilty of the same thing, that it should not be argumentative. He makes a statement that Champlin never formally accepted the offer—doesn't claim to have done it. That is really the one thing I think is out of place.

Mr. Hale: By "formally accepted" I meant, of course, a written acceptance.

Mr. McKeever: I don't know what you call formal, but I am disputing that.

[fol. 262] The Court: It won't be necessary now to argue questions in relation to that. It is better for Mr. Hale to state succinctly what he is to prove and his understanding of the case.

Mr. Hale (Continuing): Gentlemen, I didn't mean to give any false impression. What I meant was that neither Mr. Champlin nor anybody contended that there was any written acceptance of that offer.

So the question goes back to what the oral offer was by these gentlemen, and whether there was any acceptance of it, and we say there was not.

Now, let me explain this: The Cross Brothers, as the testimony will show, had invented this Cross Vapor Phase Treating System, and the essence of it, as I understand it, and I am not a technical man certainly—there has been a good deal about it in some of this testimony—but the essence of it was that the system of treating gasoline obviated a subsequent treatment by chlorine or litharge, whatever that is, by the use of copperized clay.

Now, Gentlemen, they had confidence in the chemical processes and the engineering efficiency of this treating system, and the only difficulty or draw-back about that system in the world was that it had never existed on land or sea in any commercial sense. It was something that had been down in the Cross laboratory, and the Cross brothers and Cross Development Corporation were interested in getting it on the market to see whether it was going to be a good thing in commercial use. Because, if it was cheap and economical and efficient in its operation, it was obviously going to be a big thing in the industry by virtue of the fact that it eliminated this other or additional type of treatment. If it did not work in a commercial sense, if it wasn't efficient and so on, then it wasn't any good at all,—it was just like a lot of other inventions that sit around the patent office and look good but do not amount to anything.

Now I would say I think the testimony has already shown that Mr. Champlin knew that situation. He had it explained to him. He had it explained to him that the Cross [fol. 263] Development Corporation owned the patents, and he had the interest of the Gasoline Products Company explained to him, and that was this, and the testimony will show, that the Cross Development Corporation wanted to procure an initial experimental installation of this treating system, but it wasn't financed for making such installations, and the Gasoline Products Company was going to advance $25,000 to the Cross Development Corporation for the sake of procuring an initial installation with anybody who would take it.

The understanding with whoever installed the thing being that it was to be royalty-free and was to cost whoever took it nothing if it didn't work commercially; and, if it did work commercially, the person who took it was to pay for the cost, and that is all.

Now, that situation was explained to Champlin very carefully, along with the patent situation.

Let me say here, parenthetically, I am not quite sure whether the Cross Development Corporation owned the patents or had simply patent applications. I don't think as a practical matter it makes any difference at all.

Now let me say what was the interest of the Gasoline Products Company in pushing this Cross treating process.

I won't say "push"—in advancing money to procure an installation. The only advantage was this, that the officials of the Gasoline Products Company conceived that if the Cross Development Corporation could make a commercial success of this treating process, it would stimulate the sale of the Cross Cracking process, in which alone they were financially interested, and that is the reason they were willing to advance money to the Cross Development Corporation for the Cross Development Corporation to procure this initial installation; and all that, I think the testimony will show, was very fully and carefully explained to Mr. Champlin.

The testimony will also show that Mr. Champlin never accepted the offer for one Cross Vapor Phase System treating tower, and as far as our testimony goes, we know of an offer for only one for the very good reason that this was an [fol. 264] experimental thing, and nobody could be expected to make an experiment on three towers when the experiment would prove just as much or just as little when it was made with one.

Keith tried to get Champlin to accept the proposition for the installation, on the terms named, of this treating tower; but he never succeeded in doing it; and although Mr. Champlin was willing enough to discuss it, even willing enough to get plans and designs and drawings and to consider them, there were two things, I think the testimony will show, which stuck in Mr. Champlin's crop, to use rather a vulgar phrase; and those two things were these: First, whether he was going to get into any trouble on his patents with the Gray Process Corporation by the adoption and installation of this Cross Vapor Phase System; and, second, whether the same was going to work; and all the time he kept trying to get Keith to say that it was going to operate economically, so that he could have some confidence that when he installed this thing it was going to be a practical installation and not something that he would have to rip out the next month and then go to Gray or the Liquid Phase people and put in another plant. All through the Spring, Keith and Champlin were discussing this situation and along about, I think, May or June, as the testimony will show, Keith, and I think his associates, had reached the conclusion that this Cross Vapor Phase Treating System would be prohibitively expensive to operate, and the reason

for that in their opinion was that this copperized clay, in the operation of the tower the copper was lost, and copper was expensive and it could not be, what they called regenerated, or you could not—I guess a layman would say that the copper was lost and you could not pick it up and restore it and put it back; and copper was, and is, as you gentlemen know, expensive. That was the trouble with the thing as Keith saw it, and Keith was very frank to Champlin and did the only thing which he could have done honestly, told Champlin just what the trouble was, and Champlin, as he has testified, was ready to believe that. And then all through the summer of 1926 Mr. Keith was trying to get Champlin to look ahead to the time when this cracking plant [fol. 265] was going to be finished and provide seasonably for some method of performing the supplemental treating of this cracked gasoline to which it had to be subjected to make it marketable as cracked gasoline. *I*f course it was marketable before cracking, as straight-run gasoline. But I mean as a supplement to the cracking process, Keith was working all that summer trying to persuade Champlin to put in a treating system, calling his attention to the Cross Liquid Phase treaters, calling his attention to the Gray vapor phase treater, and doing everything he could to prevent Champlin from getting into the situation which he actually allowed himself to drift into, of having a cracking process in the middle of September and no treating system to go with it. So we say that if the Champlin Refining Company lost money in September and the following months by not having a treating system, it was nobody's fault but his own. And of course there is this additional element in the case, as the testimony will develop, that if we had given him this treating system it was nothing that would have been any good to him; he would still have had to take it out and put in another, and he also very likely would have been in the position of finding himself in a patent suit with the Gray people, because they threatened him with a patent suit.

I think, gentlemen, that is the gist of our case, and we will produce the witnesses who will tell you the facts as we understand them.

L. H. HARVISON, a witness for the plaintiff, having been duly sworn, testified as follows:

Direct examination.

By Mr. Marsh:

Q. Mr. Harvison, will you give your occupation at the end of 1925?

A. Vice President of the M. W. Kellogg Company.

Q. Will you tell the jury what that company's business was at that time?

A. The company's principal business was building oil refineries or oil refinery equipment.

[fol. 266] Q. Was it engaged in other business at the same time?

A. It was engaged in other construction business as well; but the principal business was in connection with oil refineries.

Q. Will you state the relationship that existed at that time between the Kellogg Company—I will call it Kellogg Company rather than the M. W. Kellogg Company to save time—will you state the relationship between the Kellogg Company and Gasoline Products Company, Inc., the plaintiff in this action, in 1925?

A. The Kellogg Company had a contract with the Gasoline Products Company by which the Kellogg Company was empowered to obtain license or sales licenses for the Gasoline Products Company for the operation of the Cross cracking processes.

Q. And had you, up to December, 1925, been able to secure licenses for the Gasoline Products?

A. Yes; quite a large number.

Q. Will you state whether the Kellogg Company was engaged in building Cross cracking units for such licensees as were obtained?

A. The Kellogg Company did build Cross cracking plants for all licensees obtained by it for the Gasoline Products Company.

Q. Will you give the jury an estimate of the number of Cross plants that were built or building by your company in 1925; just approximately?

A. May I think out loud?

Q. Yes. Go ahead. You might name some of them you were building for.

A. In 1925 we were building Cross plants, as I recall it, for the Marland Oil Company of Ponca City, Oklahoma; for the Magnolia Petroleum Company at Beaumont, Texas,—ten units there; two units at Ponca City for Marland. One unit, I think, for the Barnsdall Company at Barnsdall, Oklahoma. For the Atlantic Refining Company at Philadelphia, Pennsylvania, six units; and for the same company at Franklin, Pennsylvania, six units. We were building a single unit job for the Union Oil Company of California. We were building two units, I think, for a company called Cory Brothers Company in England.

[fol. 267] Q. Was there any construction in the Argentine at that time?

A. I don't think there was during 1925. I am trying to think only of plants that, as I recall it, were in construction during 1925, which was your question.

Q. In your answers you have referred to units. What is a unit?

A. We speak of a Cross unit as being a single Cross plant consisting of a furnace, a reaction chamber, a set of fractionating towers, and the necessary pumps and piping to make up this unit. If we build a plant of more than one unit it is so arranged that each unit operates as a separate unit or a separate plant. That is why I speak of them as units. They are built of different sizes; different capacities I mean.

Q. What would be the approximate cost of a thousand-barrel unit at that time? I mean as you were building them at that time?

A. The approximate cost of a thousand-barrel unit at that time as I recall it was in the neighborhood of $140,000 or $150,000.

Q. So that this business ran into very large figures that you were doing?

A. Ran into large sums of money; yes, sir.

Q. Can you state approximately the amount of capital the Kellogg Company had in its business at that time?

A. I don't remember the exact figure, but it was in the neighborhood of five million dollars.

Q. Approximately how long a period did it take to complete one of these Cross plants after you signed the contract?

A. Five or six or seven months, depending on conditions surrounding the construction.

Q. In the case of this Champlin unit it took from March to September, did it not?

A. From the end of March—the contracts were signed, I believe, the last week in March, 1926,—until September or early October of the same year.

Q. Going back now to December, 1925, will you state what, if any, connection the Kellogg Company had with Cross Development corporation?

A. Cross Development Corporation?

Q. Yes?

A. Not any connection.

Q. No connection at all?

A. None whatever.

[fol. 268] Q. Will you state what, if any, connection the Kellogg Company had with the Gray Processes Corporation?

A. Not any connection.

Q. That is in December, 1925?

A. Yes, sir.

Q. Now, there has been a corporation referred to in the testimony as Cross Engineering Company. Will you state the arrangements, if any, between the Kellogg Company and Cross Engineering Company, which were made about December, 1925?

A. The Kellogg Company made a contract with the Cross Engineering Company in December, December 10, 1925, to be specific, by which the Cross Engineering Company became sales representatives throughout the Mid-Continent territory for the oil refinery business of the Kellogg Company.

Q. Did this arrangement relate also to the employment of Mr. P. C. Keith, Jr.?

A. I don't remember whether it related to it insofar as the terms of the contract are concerned.

Mr. McKeever: If the Court please: If the terms of the contract are to be set out——

Mr. Marsh: No; I am not going to discuss that.

The Court: No; he is not asking that.

A. As a matter of fact, whether it was stated in the contract or not, Mr. Keith came into the employ of the Cross Engineering Company at the same time as the Kellogg Company made the contract with the Cross Engineering Company.

Q. That is, the contract to represent it in the mid-continent field?

A. Yes. To represent the Kellogg Company as sales agents—Pardon me. And the Cross Engineering Company at that time succeeded Mr. Harcourt who had been situated in Kansas City as a direct employe of the Kellogg Company. Mr. Keith, by virtue of his position as Vice President or operating head of the Cross Engineering Company, took up the work that Mr. Harcourt had been doing for the Kellogg Company.

Q. Will you state whether or not Mr. Keith had had any previous employment from the Kellogg Company, prior to this date I speak of?

A. No. Mr. Keith had not. Mr. Keith had never been [fol. 269] in the employ of the Kellogg Company up to this time and wasn't in the employ of the Kellogg Company until a later date.

Q. Do you remember the name of Mr. Keith's firm, of which he was a member, prior to this arrangement?

A. Yes. When I first met Mr. Keith the name of the firm was Keith & Winkler.

Q. That was referred to in the testimony of Mr. Koch, earlier this morning?

A. I believe so. Yes.

Q. Now, in the making of this arrangement between the Kellogg Company and the Cross Engineering Company, that you have referred to, will you state whether—and if so what—arrangements were made for representation of the Cross Development Corporation?

A. No arrangement was made. The Cross Development Corporation didn't enter into the picture in any way, shape nor manner.

Q. When was the first time that you personally met any of the representatives of the Champlin Refining Company, in relation to their purchase of a Cross cracking plant?

A. During December, 1925.

The Court: Now you are on another branch of the case, and you may take a recess, gentlemen, for about ten minutes.

(Recess at this point for ten minutes, beginning at 3.50 o'clock, p. m.)

Q. I have just asked you as to the first occasion on which you met any representative of the Champlin Company in connection with the matter of their installing a Cross cracking plant, and you hadn't replied to that question.

A. I started to reply. It was in December, 1925. In New York City.

Q. In New York City. Are you sure it was in December, or was it a short time later?

A. No, it wasn't later. It was in January, 1926. It was on or about January 12, 1926. Mr. P. E. Slater came to New York with Mr. Keith. They had been in Philadelphia looking over the Cross cracking plant of the Atlantic Refining Company and came to New York from Philadelphia. [fol. 270] Q. What was the subject matter of that conversation that you had with Mr. Slater?

A. The subject matter was the Cross cracking plant.

Q. Was there considerable discussion of the Cross cracking plant at Point Breeze?

A. I wasn't at Point Breeze. I didn't know about the discussion there. I didn't meet Mr. Slater until he came to New York. I had lunch with Mr. Slater and Mr. Keith in New York and we talked about the Cross cracking plant and we talked about treating methods.

Q. Which Mr. Slater was that?

A. That was Mr. Phil Slater. Mr. P. E. Slater, I believe.

Q. What was his capacity at that time?

A. He was refinery superintendent for the Champlin Company at that time.

Q. Now what was the discussion that you had with Mr. Slater and Mr. Keith with reference to treating?

Mr. Jones: Your Honor please, we object to the testimony of any conversation with Mr. P. A. Slater.

The Court: He was the then superintendent?

Mr. Jones: Yes.

Mr. Marsh: Mr. Champlin has testified that he sent Slater.

The Court: Yes, he did, he said he sent him all over the country to get information.

Mr. Jones: He isn't here. We objected to the testimony by the other side, conversation of others with Mr. Keith.

The Court: The fact he isn't here wouldn't be——

Mr. Jones: He would be an agent.

The Court: The fact he wasn't here in the court room——

Mr. Jones: No. He was simply an agent of the defendant company.

Mr. Marsh: Mr. Keith was here and could be examined——

Mr. Jones: He testified to a conversation with an agent of the defendant corporation.

Mr. Marsh: Mr. Champlin has testified himself Mr. Slater was sent out and testified what he has said and what he found out.

[fol. 271] The Court: I think he may answer.

(Exception reserved for the defendants.)

(Question read.)

A. We were discussing——

Q. Now I will say first, what was the subject matter of the discussion?

A. I say the subject matter of the discussion was——

Q. As relating——

A. To the Cross cracking plant and treating. You asked me what the discussion was about treating.

Q. Now will you state what type of treating apparatus were discussed with Mr. Slater by you?

A. The Cross copperized clay treater principally.

Q. Do you remember what views you expressed to Mr. Slater in reference to that?

A. Yes, sir. I told Mr. Slater that he and his people should keep in mind in their consideration of the process that the Cross process had never been commercialized.

Q. That is, the Cross treating process?

A. The Cross treating process, I mean. That nothing had ever been done on it outside of the laboratory.

Q. Did you have any discussion with reference to the Gray process at that time?

A. I don't think we did.

Q. Did you have any discussion with reference to the Gray patent?

A. I think we did, yes.

Q. Will you tell the substance of what you stated to Mr. Slater as to the Gray patent situation?

A. I stated this to Mr. Slater. If I understand, the difference between the Cross process, the Cross treating process, and the Gray process was that the Cross treating process had gone one step further than the Gray process, by adding the use of copper or copperizing the same kind of clay as was used in the Gray process. In other words, the identical Gray process was an addition made to it. And I told him my understanding of the patent law was that if an improvement was invented on an invention that the inventor of the improvement while he could prevent inventors of the original process from using his improvement, could not himself use the improvement or the original process, and for that reason it seemed to me that they should [fol. 272] very carefully consider whether they might not get into legal trouble with the Gray Company if they were using the copperized clay process.

Q. This being due to the similarity between the two processes with the exception of the——

Mr. McKeever: That is leading, I suggest.

The Court: Yes, very leading. You testify yourself.

Q. I will withdraw that question. Do you think Mr. Slater understood what you said?

(Objected to as the opinion of the witness. Excluded.)

Q. You stated, I believe, Mr. Harvison, what your relations were with the Gray Processes Corporation at that time?

A. I stated that we had no relations.

Q. That you had no relations with them?

A. That is right.

Q. Will you state whether you had any incentive from the point of view of money?

(Objected to. Excluded.)

The Court: He said he had no relations.

Q. Mr. Harvison, what was the next occasion on which you had talk with the representatives of Champlin Refining Company with reference to the matter of the cracking unit?

A. The next occasion was on February 5th and 6th.

Q. Where did it take place?

A. In Enid, Oklahoma. I had received a telegram I think it was from Mr. Keith a few days before that time, asking me to meet him in Enid, saying that Mr. Champlin was ready to close the contract for the Cross cracking plant, and I went to Enid for the purpose of negotiating and signing the final contract for the plant.

Q. Where did you first meet the representatives of the Champlin Refining Company?

A. Mr. Keith and I went around to Mr. Champlin's office and met Mr. Champlin there. In the morning, I think it was, of February 5th.

Q. You state what first occurred?

A. Yes. I have a very vivid recollection. Mr. Champlin told us immediately after we got in his office that he wasn't ready to close the contract, and I thereupon told him that I evidently had come to Enid under a misappre [fol. 273] hension, because it was Mr. Keith's business to sell the plant, not mine, and that I therefore would return immediately to New York where I had come from.

Q. What happened then?

A. Mr. Champlin asked me not to leave his office immediately, that he wanted to talk about the proposition, and we proceeded to discuss it. Mr. Champlin asked me in reference to—questions with reference to the contracts we had made with other companies. He wanted to satisfy himself that the price that we had quoted on the plant and the price we had quoted for Gasoline Products Company on the royalty rate——

Q. When you say the price that you had quoted on the plant——

A. On the Cross cracking plant.

Q. That means the Kellogg Company?

A. That the Kellogg Company had quoted on the Cross cracking plant and that the Kellogg Company as agents for the Gasoline Products Company had quoted on royalty for the operation of the plant, were in line with the prices for similar plants elsewhere. I had with me copies of some contracts, namely, those with the Marland Refining Company, and I left those contracts with Mr. Champlin to read over. We also discussed while I was in his office methods of treating the gasoline, and I told Mr. Champlin substan-

tially the same with regard to the Cross vapor phase treating process as I had told Mr. P. A. Slater previously in New York.

By the Court:

Q. Did you say anything to Mr. Slater that you did not tell Mr. Champlin?

A. I don't think so, Your Honor.

The Court: That would remove your objection, wouldn't it?

Mr. Jones: Yes.

A. We adjourned for luncheon. Mr. Keith and I went back to the hotel, and Mr. Champlin came to the hotel after lunch for a further discussion, and told us to prepare our contract, meaning the construction contract of the Kellogg Company for the Cross cracking plant, the draft of the contract between the Gasoline Products Company and the Champlin Company, and the guaranty contract between the Gasoline Products Company and the Kellogg Company. We got busy at that immediately.

[fol. 274] Q. You say "we." Whom do you mean?

A. Mr. Keith and myself.

Q. Mr. Champlin having left you at that time?

A. Mr. Champlin having left, yes.

Q. Mr. Harvison, I will ask you, were there any drafts prepared in advance of these three contracts that you have just described?

A. I think not.

Q. You had no drafts?

A. I think not. I took copies of contracts for similar jobs with other companies with me to use as drafts for the Champlin contracts in the event of making it.

By the Court:

Q. Don't you have a printed form of contract?

A. No, Your Honor, we did not have any printed—we never had any printed form of construction contracts or any printed forms of guaranty contract. We did have the printed form of license contracts. I am not sure whether we had a printed form of the license contract on this par-

ticular job with us or not. At any rate, whether we have or not, it wasn't used at the time.

Q. Then proceed with your statement.

A. We worked during the afternoon and evening with a stenographer in the hotel preparing the contract.

Q. This was on——

A. This was on Friday, February 5th, in the Oxford Hotel in Enid. The contracts were finished late that evening and delivered to Mr. Champlin the following morning.

Q. Where did this delivery of the draft contracts take place, where did you meet Mr. Champlin in the morning February *6th*?

A. I am not sure whether I met Mr. Champlin in the hotel or at his office. I don't remember.

Q. But at any rate you had these drafts that you and Mr. Keith prepared and handed those to Mr. Champlin?

A. Yes, sir.

Q. I will ask you whether you remember, Mr. Harvison, what the draft of the construction contract provided as to terms of payment for the construction of the Cross cracking unit?

(Objected to as the contract is the best evidence, by counsel for the defendants.)

[fol. 275] Mr. Marsh: I am asking him, not what the contract contained, but what the draft which he handed Mr. Champlin contained.

The Court: I think the final contract is admissible. He asks what the preliminary draft——

Mr. McKeever: Unless he gives some reason for establishing that same applies to that.

The Court: I don't think any one can say what the price was on a preliminary draft. He may answer.

(Exception reserved for the defendants.)

A. The question was in regard to the terms of payment?

Q. Yes.

A. The terms of payment in these drafts left with Mr. Champlin at that time were, 85% monthly of the price of the material delivered during the previous month and of the material worked on during the previous month, to be paid sometime during the month. I think it was not later

than the 20th of the month. The final 15% to make up the full contract price payable not later than thirty days after the completion and acceptance of the plant.

Q. Now will you state what, if anything, was said to you by Mr. Champlin with reference to the subject of treating during this visit of yours in Enid?

A. I said we discussed the Cross vapor phase copperized treater and I told Mr. Champlin in effect exactly what I had told Mr. Slater in New York. I saw Mr. Champlin at the time of delivering the contracts to him. He told me at that time that he had not made up his mind what he would do with regard to treating, that there was plenty of time to make such a decision, that he probably wouldn't make that decision for at least sixty days yet.

Q. Will you state whether the draft of the construction contract which you prepared and handed Mr. Champlin had any reference to this matter of treating?

A. It had not.

Q. These drafts of contracts that you handed Mr. Champlin were not signed by either party, were they?

A. At that time?

Q. At that time?

A. No, sir.

Q. Now, Mr. Harvison, the answer of the defendant in this suit and also the testimony of Mr. Champlin referred [fol. 276] to a proposal dated February 6, 1926, signed by Mr. Keith, Vice President Cross Engineering Company. Mr. Champlin has testified that that letter was handed to him with these three other drafts. Will you state what, if any, recollection you have of seeing that letter?

A. I have no recollection of seeing that letter at that time.

Q. At that time. Did you stay in Enid after the draft contracts had been handed to Mr. Champlin?

A. No, sir; I left Enid late in the morning of Saturday, February 6.

Q. What was the next information that you had with reference to the situation at Enid?

A. I believe the next information I had was in a report from Mr. Keith, whose business it was to keep in touch with Mr. Champlin after I left there, the situation having been that Mr. Champlin told us his financing for the plant hadn't been completed and the contracts for the work

wouldn't be executed until such financing had been completed. Mr. Keith was keeping in touch with Mr. Champlin, to be on the spot when that happened, and reporting to me from time to time in New York what the situation was.

Q. Did Mr. Champlin make any statement to you with reference to the proposal to put in Cross Vapor Phase treating towers at the time those contracts were handed to him?

A. I don't know what you mean.

(Question read by Reporter.)

A. You mean with reference to the letter of February 6th?

Q. Not the letter, no; the proposal.

A. The general proposal?

Q. The proposal.

A. Yes; I said we had discussed it. I had discussed it with Mr. Champlin and told him the same as I told Mr. Slater in New York. There was a general discussion on the subject.

Q. I was speaking of the last conference immediately before you left Enid at which the contracts were handed him, the forms of contract?

A. Yes, sir. I testified just a moment ago that Mr. Champlin told me he had made no decision in reference to [fol. 277] his treating plant and wouldn't do so for a matter of sixty days or so, since he had plenty of time.

Q. What was the next report you got from Mr. Keith you were just about to speak of?

A. The next definite report I had from Mr. Keith was a telephone call at my home along toward the end of February. I don't remember the exact date, but I presume it was about the 25th or 26th. With regard to the terms of payment for the Cross cracking plant, asking if those terms of payment could be changed from the payments submitted in the draft left with Mr. Champlin, to different terms.

Q. Did you make any reply to that request?

A. Yes; I told Mr. Keith to make certain changes in those terms of payment, and Mr. Keith thereupon re-wrote the draft of the contract, re-wrote Clause 3 of the draft

of the contract, which was the clause covering the terms of payment.

Q. I call your attention to the construction contract which appears as Exhibit 1 to the answer of the defendant, the original answer in equity, and ask you to state the substance of this Clause 3 as it appears in that contract?

The Court: As it appears in the contract? If they object to it, it will have to be read, I suppose.

Mr. McKeever: I object to the witness stating his own construction of the substance.

Mr. Marsh: Paragraph 3 of this contract, Gentlemen, reads as follows (reading):

"Terms of Payment: Within thirty (30) days after the Contractor begins the work herein provided for, the Purchaser agrees to pay Forty Thousand ($40,000.00) Dollars, and to pay the further sum of Forty Thousand ($40,000) Dollars within each thirty (30) days thereafter until the sum of One Hundred Sixty Thousand ($160,000.00) Dollars is paid. An additional Forty Thousand ($40,000) is to be paid upon completion of the plant. If the Contractor should complete the work in less time than four (4) months so that One Hundred Sixty Thousand ($160,000.00) Dollars should not have been paid at the completion of the [fol. 278] plant, the Purchaser will pay upon the completion of the plant, such an amount that with the amounts already paid will make Two Hundred Thousand ($200,000) Dollars. Upon completion of the plant and acceptance thereof by the Purchaser, the Purchaser is also to deliver its notes to the Contractor aggregating Two Hundred Thirteen Thousand ($213,000.00) Dollars as follows:

Ten (10) notes of Twenty Thousand ($20,000.00) Dollars, and One (1) note of Thirteen Thousand ($13,000.00) Dollars, the first of said notes to mature Thirty (30) days from date and the balance, one every Thirty (30) days thereafter until all are paid; said notes to bear Six (6%) percent interest from date."

Q. I call your attention, Mr. Harvison, to the fact there was a provision here for deferring the first four installments, or five installments, of $40,000, and a provision for giving at the completion of the contract notes aggregating $213,000, maturing over monthly periods, thirty days from

date and one every thirty days thereafter. Can you state the reason why that change was made?

A. Mr. Keith told me over the telephone that in his opinion, if we didn't make some such terms on the job, we would lose it. That was a sufficient reason.

Q. I hand you a copy of a letter to Mr. Keith, and ask you to glance at that for the purpose of refreshing your recollection.

Mr. McKeever: Judge, if the Court please, the witness added something there that is not responsive, that is more argumentative, in that answer, which I think was improper.

The Court: Of course, what Mr. Keith said privately to this witness is not particularly admissible. It is usually harmless unless he states some substantive matter.

Mr. McKeever: I don't like to object oftener than I have to, but I feel that that should be struck out.

The Court: What part would you like to have stricken out?

Mr. McKeever: What he repeated that Keith said.

The Witness: I beg pardon, I didn't repeat anything that Mr. Keith said.

[fol. 279] Mr. McKeever: I beg pardon. I would like not to be interrupted by the witness, please.

(The last answer read by the Reporter.)

Mr. McKeever: The part that that was a sufficient reason, I seriously object to.

The Court: Strike that out.

Mr. McKeever: I think it is improper for him to relate the statement of Keith over the telephone.

The Court: You didn't object, and I presumed it wasn't considered important.

Mr. McKeever: All right.

The Court: The last part may be stricken out.

By Mr. Marsh:

Q. Mr. Harvison, what was the date on this letter from Mr. Keith to yourself?

A. February 27, 1926.

Q. Do you remember receiving the original of that letter?

A. Yes, sir.

Q. Will you state to what it relates?

Mr. McKeever: I object.

The Court: Is that a letter from Keith to him?

Mr. Marsh: Yes, sir.

The Court: Not in evidence?

Mr. Marsh: No.

The Court: I don't think he can state what it relates to, or the contents of it, as long as you have the letter there.

Mr. Marsh: I will offer it in evidence, marked as Plaintiff's Exhibit 4.

(Document referred to was marked "Plaintiff's Exhibit 4".)

The Court: How would that be admissible?

Mr. Marsh: I don't propose to offer the letter itself in evidence. I merely wished to refresh his recollection with the contents of it.

The Court: Show it to him.

Mr. Marsh: I have shown it to him. Now I want to ask him not what is in it, but what is not in it.

[fol. 280] The Court: I don't see how it is admissible—what is in the letter.

Mr. Marsh: I will ask him what is not then.

The Court: I don't think you can get in the contents of that letter against their objection.

Mr. McKeever: He certainly can't get in the contents of something that is not in it by the use of the letter, because it is not there.

By Mr. Marsh:

Q. I will ask you, Mr. Harvison, this: I am not anxious to have the letter in the record. Do you remember of receiving from Mr. Keith copies of the contracts relating to the construction of the Cross Cracking Units, that is, the contract between the Kellogg Company and Champlin, the License Agreement between the Gasoline Products Company and the Champlin Refining Company, and the contract between the Gasoline Products Company and the Champlin Refining Company, guaranteeing the performance of the Cross Cracking units, signed by Mr. Champlin.

The Court: Do you remember that circumstance?

A. I remember of receiving the contracts, yes, sir. I remember that the construction contracts were signed. I

remember that the License Contract was signed. I do not remember whether the Guarantee Contract was signed or not.

Q. You remember of receiving the drafts?

A. Yes, sir.

Q. Were those papers received with this letter (Plaintiff's 4)?

A. Yes, sir.

Q. Were those drafts the same in all respects, or these signed papers that you received the same in all respects, as the papers which you left with Mr. Champlin on February 6th, or were there some changes?

A. I am not sure that they were the same in all respects.

Q. You just testified about the matter of the terms of payment?

A. They weren't the same in respect to the terms of payment in the construction contract. I had previously testified that Mr. Keith had re-written Clause 3 in that con- [fol. 281] tract. I do remember that the construction contract was exactly the same as the draft I left with Mr. Champlin except for Clause 3, but I am under the impression that there were some slight changes made from the original drafts of the License and Guarantee Contracts by Mr. Keith before they were forwarded back to me in New York.

Q. Were the changes in the papers called to your attention by this letter?

A. Yes, sir; either the changes in the papers or changes desired to be made in the papers.

Q. Then, Mr. Harvison, after receipt of these papers from Mr. Keith, of which you remember two were signed by Mr. Camplin, and you were in doubt as to construction contract——

A. I was in doubt as to the guaranty.

The Court: Why should Mr. Champlin sign a guaranty contract?

Mr. Marsh: There was an acceptance I think. I am not sure about it.

The Court: It was a unilateral contract?

Mr. McKeever: No; they were both to do some things. It was bilateral.

Mr. Marsh: The purpose of the signature on the guaranty contract was because there were certain obligations imposed upon the Champlin Company.

Mr. McKeever: That is correct.

By Mr. Marsh:

Q. After receipt of these papers what occurred in New York with reference to them?

A. The construction contracts were signed by the Kellogg Company in New York in exactly the form in which they were presented to us by Mr. Keith. The license contract and the guaranty contract were turned over to the Gasoline Products Company with the advice received from Mr. Keith in transmitting those contracts to us, and rewritten by the Gasoline Products Company. The construction contract and the license were returned by me to Mr. Keith, to be delivered to Mr. Champlin. The guaranty contract was forwarded from the Gasoline Products Com-
[fol. 282] pany to Dr. Roy and Dr. Walter Cross in Kansas City for their approval and to be delivered by them to Mr. Keith for transmittal to Mr. Champlin.

Q. Do you remember whether any changes were made in these papers as received from Mr. Keith?

A. Yes, sir; changes were made in the license and guaranty contracts from the drafts as received from Mr. Keith.

Q. Was a letter written to Mr. Keith explaining what those changes were?

A. Yes, sir.

Q. I show you this paper and ask you whether that refreshes your recollection as to when those papers went west to Mr. Champlin?

A. Yes, sir.

Q. Will you state what date that was?

A. March 12, 1926.

By the Court:

Q. Those were the final papers that were subsequently signed by Mr. Champlin?

A. Yes.

By Mr. Marsh:

Q. Will you state now when the construction work started on the Cross cracking units?

A. The work in the field?

Q. The work in the field, yes?

A. I don't know exactly; but it would normally start in about three months after receipt by us of the contract for the work.

Q. You don't remember, however, when?

A. I don't remember the exact date, no; but I do know that the field work must have started sometime around the first of July; either slightly before or slightly after.

Q. Can you state when the fabrication of the steel work began in New York?

A. The fabrication of the steel work began in New York in April.

Q. What was the next date on which you heard anything about the subject of treating, if you can remember?

A. I don't remember the next date; but I do remember that the subject of treating came up roughly two months or so after the signing of the construction contract for the cracking plant. I remember definitely that Mr. Glasser was in New York with some other gentlemen from the Champlin Company during May discussing that subject.

[fol. 283] Q. Can you place the approximate date of that conference?

A. I think it was about May 13th; I am not sure.

Q. Who were present at that conference, Mr. Harvison?

A. Mr. Glasser, and Mr. Jamieson, and I think a Mr. Jackson.

Q. Who was Mr. Jamieson?

A. I understood he was a director of the Champlin Company.

Q. And who was Mr. Jackson?

A. I don't know.

Q. Who else was present at the conference?

A. Mr. Kellogg, Mr. Keith, Mr. Ramsay Hoguet, and myself.

Q. Who was Mr. Ramsay Hoguet?

A. Mr. Ramsay Hoguet was a patent attorney who acted for the Kellogg Company.

Q. Did Mr. Glasser state to you, or did Mr. Jamieson or Mr. Jackson state to you on whose behalf they called on you?

A. We knew that Mr. Glasser came to us on behalf of the Champlin Refining Company. I don't remember any

definite statement by Mr. Glasser in our office to that effect.

Q. Had you any other business with any of those gentlemen?

A. No, sir.

Q. Was there any reference in that conference to the subject of Cross vapor phase treating towers?

A. Yes, sir.

Q. Did you make any statements with reference thereto, to Mr. Glasser?

A. Yes, sir. We told Mr. Glasser that in our opinion it would not be safe legally for them to use the Cross process; that we were convinced that they would be sued by the Gray Process Company if they did use the Cross process.

Q. Can you remember whether any opinion on this matter was expressed by Mr. Hoguet?

A. Yes, sir; Mr. Hoguet gave that as his opinion, that they would be sued by Gray.

Q. Was there any discussion at this conference with reference to the installation of Gray towers for the Champlin plant?

A. By the Kellogg Company?

Q. No; not by the Kellogg Company. Installation of them to use with the cracking plant?

Mr. McKeever: I object to that question for the reason I think it is leading and suggestive.

[fol. 284] The Court: I think it would be better to let him give the conversation.

Mr. McKeever: And I would like to have that question withdrawn.

Mr. Marsh: I will withdraw it.

Q. Will you state the substance of any conversation that took place with reference to the Gray treating process?

A. I can't remember all the details of the conversation, but the conversation was a general conversation with regard to the patent situation surrounding this vapor treating process. We told Mr. Glasser and his associates—I say "we"—Mr. Kellogg, Mr. Hoguet, Mr. Keith and myself, what I have just related, with respect to our ideas on the patent suit. Mr. Glasser during the time he was in our office expressed a desire to talk with Mr. Gray of the Gray Company, and we called Mr. Gray on the telephone from our office, made an engagement for Mr. Glasser, and I understand that Mr. Glasser later kept that engagement.

Q. Did the Kellogg Company and the Gray Processes Corporation have any business relations at that time; at the time of that conference?

A. They had no contractual relation at that time. My recollection is that negotiations which later led to the contract between the Kellogg Company and the Gray Process Corporation had started about that time.

Q. Will you state the date when a formal contract—if such was the case—was entered into between the Kellogg Company and the Gray Processes Corporation?

A. Such a contract was made in December, 1926.

Q. Do you remember the approximate date of it?

A. No. I don't recall; except that it was in December.

Q. Was that contract delivered to the parties at the time of its signature?

A. No, sir.

Q. What was done with it?

A. It was put in escrow for two months.

Q. What do you mean by saying that it was put in escrow?

A. I mean that the contract as written didn't take effect [fol. 285] as of the date on the contract; that the going into effect of that contract as it was written was dependent on the accomplishment of certain things.

Mr. McKeever: Now I object to him stating what it was dependent upon and what the contents were.

The Court: I don't see the immediate bearing of that, anyway. He has stated that there was later a contract between the Kellogg Company and the Gray Company, which didn't take effect until two months after December, 1926.

Mr. McKeever: I have no objection to that, if Your Honor please. It is only just to the statement of what was in it.

Q. At the time of that conference or on that occasion of that conference on May 13th,—whatever date you believe it was held—was any statement made to you by any representative of the Champlin Refining Company as to there being a contract for the installation of Cross vapor phase treating towers at Enid, Oklahoma?

A. No, sir.

Q. Will you state whether or not there was any reference to any such contract being in existence?

A. There was no such reference. No, sir.

Q. Did you have knowledge of any such contract?

A. No, sir.

Q. Mr. Harvison, when did you next hear any reference to this matter of the installation of a treating process or treating towers at the Champlin plant?

A. My recollection is that the next I heard about it was early in July, through a letter or a telegram, I don't remember which, from the Champlin Company, to the effect that they had a letter—a contract or proposal, I have forgotten what it was—from the Cross Engineering Company, under date of February 6, 1925, for the installation of a vapor phase treating plant.

Mr. Hale: You said February 6, 1925?

A. I meant 1926. Thank you.

[fol. 286] Q. To refresh your recollection, Mr. Harvison, I will show you Defendant's Exhibit 15. Do you remember seeing that telegram?

A. Yes, sir.

Mr. Marsh: I will read that so that the jury will be reminded of its contents. This is a telegram to the Kellogg Company, signed by the Champlin Refining Company, and states: "Our Cross cracking plant will be completed within a few days under your contract. Nothing is being done toward the installation of the Cross vapor phase treating units. Have wired Mr. Welling but he does not reply. Imperative that something be done that there shall not be any delay in starting plant."

Q. Now, do you remember, Mr. Harvison, what occurred upon receipt of that telegram, so far as you personally were concerned?

A. Yes, sir.

Q. What was it?

A. That telegram was discussed with the Gasoline Products Company—or, rather, I should say with Mr. Welling,—discussed with Mr. Welling.

The Court: Now you shouldn't say what he told you.

Mr. Marsh: No, sir. I am not going to ask him that.

Q. Now, I will show you Defendant's Exhibit 20, and ask you if you remember of receiving that telegram?

A. Yes, sir.

Mr. Marsh: I will read that to the jury. This is another telegram from Mr. Champlin to the Kellogg Company.

"Letter from Welling received. We cannot accept his version of agreement to install Cross vapor phase treating towers. We hold stipulation signed by Cross Engineering Company covering installation of treating towers. We are depending upon such installation for treating our gasoline. Inasmuch as Mr. Harvison and Mr. Keith, your selling agents, were parties of this agreement, suggest that all erecting operations be stopped until all differences are adjusted."

Mr. McKeever: What is the date of that?

Mr. Marsh: August 5, 1926.

Q. Now, Mr. Harvison, I will ask you if Defendant's Exhibit 21 was a reply to that telegram?

A. Yes, sir. It was.

[fol. 287] Mr. Marsh: And I will read that to the jury. "H. H. Champlin, Champlin Refining Company, Enid, Oklahoma. Your telegram received. Please forward us via air mail copy of treating tower proposition signed by Cross Engineering Company referred to in your wire. In meantime we will continue construction of cracking plant according to contract. The M. W. Kellogg Company."

Mr. McKeever: What was the date of that?

Mr. Marsh: August 5th. The same day.

Q. Now, I show you Defendant's Exhibit 22, which is a letter from Mr. Champlin to the M. W. Kellogg Company, and ask you if you remember seeing that letter?

A. Yes. I do.

Mr. Marsh: I will read that to the jury. "Complying with your telegram——

The Court: Is that the long letter?

Mr. Marsh: No, sir. Not the long letter of Welling.

The Court: I wondered what the object was in rehearsing all these exhibits.

Mr. Marsh: I simply want to call it back to his attention as a basis for a question.

The Court: Hasn't he read it?

Q. I will ask you whether there was enclosed with that letter a copy of this February 6th letter signed by Mr. Keith as Vice President of the Cross Engineering Company?

A. Yes, sir. There was.

Q. Will you state whether, so far as you now remember, you had seen a copy of that before this date?

A. I am quite sure that I had never seen a copy of it before receiving it with that letter from the Champlin Company.

Q. Mr. Champlin, the record has contained a number of telegrams passing between New York and Enid during the months of August, September and October—I won't rehearse those in order to save the time of the Court——

The Court: Yes.

[fol. 288] Q. (continued). I show you copy of telegram dated March 19, 1926, directed to the M. W. Kellogg Company, signed H. H. Champlin, and I will ask you whether you remember receiving the original of that telegram?

Mr. McKeever: May I ask Mr. Marsh whether that has been in evidence?

The Court: Yes. All these have been in evidence.

Mr. Marsh: No, Your Honor, this hasn't been in evidence. I will show you this (To Mr. McKeever).

(Shows telegram above referred to to counsel for defendant.)

The Court: Wasn't that taken from the exhibits?

Mr. Marsh: No. This hasn't been in yet. This is the only one that hasn't.

The Court: Oh, I didn't know that.

Mr. Hale: You would better get that marked, first.

Mr. Marsh: Yes. I ask that this be marked as Plaintiff's Exhibit "E." From Champlin to the Kellogg Company.

(Plaintiff's Exhibit "E" marked.)

Mr. McKeever: May we see that?

(Plaintiff's Exhibit "E" handed to counsel.)

Mr. Marsh: Mr. McKeever, perhaps in order to save time I might be going ahead on some other subject, while you are examining that telegram——

Mr. McKeever: We will be through with it in just a minute.

The Court: Well, you won't get through with this witness to-night, and I want to adjourn a little before five; so we will suspend until to-morrow morning, gentlemen, at half past nine.

(Suspended here, at 4.55 o'clock, p. m., until 9.30 a. m. Friday, April 26, 1929.)

Forenoon Session (Friday Morning, April 26, 1929)

Direct examination.

By Mr. Marsh:

(Testimony of Mr. Harvison resumed.)

[fol. 289] Q. Mr. Harvison, in the course of your testimony yesterday you referred to the dates of several conferences, and I want to ask you if you have refreshed your recollection as to the exact dates on which these several conferences took place?

A. Yes, sir. I have.

Q. Now first the conference that took place in New York at your office when Mr. Keith and Mr. Slater came up from the Atlantic Refining Company plant, can you place the date of that?

A. The date that you refer to is January 8th and was not at my office. It was at the Biltmore Hotel in New York. January 8, 1926.

Q. Now the date of the two days on which you were in Enid with Mr. Keith when you had the several conferences with Mr. Champlin and Mr. Slater, what were the two dates?

A. Those dates were February 5 and 6, 1926.

Q. And the date on which you had the large conference in the Kellogg Company office in New York, at which Mr. Glasser and Mr. Jamieson and Mr. Jackson and various representatives of the New York people were present?

A. That was on May 18, 1926.

Q. When you were in Tulsa on the occasion of the visit of February 5th and 6th, will you state whether you saw Mr. Thomas E. Gray? I mean at Enid.

A. Yes, I saw Mr. Thomas Gray and one of his brothers in the Oxford Hotel in Enid.

Q. Will you state what occurred on that occasion?

A. Mr. Keith and I stepped off the elevator and ran into Mr. Gray and his brother. Mr. Gray said, "What are you trying to do to us?" I don't remember his exact words. (Objected to.) "What are you trying to do——

The Court: The objection on the part of counsel for the defendant here.

Mr. Marsh: I didn't ask him what the conversation was, Your Honor. I asked him what occurred, and this has a bearing on the cross-examination in the Gray deposition. I simply want to clear up the fact which apparently is misunderstood by my brothers on the other side.

[fol. 290] The Court: I know nothing about any Gray deposition, do I?

Mr. McKeever: It has been taken by counsel on the other side and will be used later.

The Court: Yes. I haven't seen it.

Mr. McKeever: No.

The Court: I don't know whether the conversation is valid or not, but I should think not.

Mr. McKeever: Personally I am not objecting to the question. To the way he puts it.

The Court: I thought you objected to the answer.

Mr. Marsh: I certainly will not press it.

Q. Will you state what you told Mr. Gray as to the conversation that you had had with Mr. Champlin?

A. I told Mr. Gray that I had not urged Mr. Champlin to put in a Cross vapor phase treating plant as he——

By the Court:

Q. You had not what?

A. That I had not urged Mr. Champlin——

By the Court:

Q. Urged.

A. Yes, sir. I had not urged Mr. Champlin to put in a Cross vapor phase treater as Mr. Gray thought I had.

Q. Did you say whether or not you had referred to the Gray process?

A. Yes, sir. I told Mr. Gray that I had told Mr. Champlin that the Gray process was the——

Mr. McKeever: Now if the Court please—I hav said I would not object to the form of his question; he asked what was done. The Gray deposition does show some things that were done there. I think we should object to the conversation between Mr. Gray and Mr. Harvison with reference to the particular subjects which he is now trying to cover.

The Court: Well, it is clearly inadmissible for him to proceed with what he said to Mr. Gray as to the conversation between him and Mr. Champlin, unless it has some connection with the Gray deposition I don't know about.

Mr. McKeever: Well, it could have no way of making his conversation competent, and the reason why it is dan-
[fol. 291] gerous, he of course can relate any kind of a conversation he desires, and I want to——

Mr. Marsh: I want to confine it to what was done. That was the question I asked him.

Q. Now Mr. Harvison, can you enumerate the Cross cracking units in connection with which the Kellogg Company has installed or has—strike that out. Will you please —I want to ask a different question. Can you state the Cross cracking units in connection with which there are Gray treating towers installed, which were installed by the Kellogg Company?

A. Yes, I think I can.

Q. Will you state them?

A. There were only three or four such plants. One was for the Waverly Oil Works at Pittsburgh, Pennsylvania. One was the Vacuum Oil Company in Paulsboro, New Jersey. One was for the Argentine Government in Argentina.

Q. To refresh your recollection, was one built for the Texas and Pacific Coal and Oil Company?

A. Texas and Pacific Coal and Oil Company of Fort Worth, Texas.

Q. Were there any other Cross cracking units in connection with which the Kellogg Company installed Gray treaters?

A. I think not. I don't recall any others.

Q. Will you state the policy of the Kellogg Company since your contract of December, 1926, with the Gray Company, as regards the offering of Gray treaters in connection with Cross cracking units?

A. Well, if I understand what you mean, when we make propositions for cracking plants, we do not normally include with that proposition a proposition for a treating plant. The Gray—the propositions on Gray treating plants are made entirely separately, if at all, from the proposition on the cracking plants.

Q. From your experience in connection with the construction of Gray treaters, those to which you have referred, can

you state approximately what period of time it requires from the receipt of an order for a Gray treating plant to get it installed?

A. Approximately sixty days.

Q. Approximately sixty days from the date of the order?

A. Yes, sir.

[fol. 292] Q. That is based on your own experience?

A. Yes, sir.

Q. From December, 1925, through the period which has been referred to in the testimony, and up to the present time, has there ever been brought to your knowledge or to your information any acceptance by the Champlin Refining Company of the proposals which were made in your presence or by Mr. Keith at any date?

Mr. McKeever: If the Court please, we object to that for the reason that it is calling for a conclusion of the witness. The facts themselves will determine that for the jury.

Mr. Marsh: It is a fact, Your Honor, of whether the acceptance is received.

Mr. McKeever: That involves the witness' passing on what constitutes an acceptance.

By Mr. Marsh:

Q. I will ask you whether any written acceptance has ever been received?

A. No, sir, none at all.

Q. Now I will ask you whether any acceptance has been received?

Mr. McKeever: We object to that.

The Court: Of course, that does in a way involve a conclusion of law as to what is and what is not an acceptance, but he can be inquired of in some way, surely, whether or not any proposition on his part has been accepted.

Mr. McKeever: Wouldn't this be the rule, and are we not entitled to have this rule on this particular point strictly adhered to—being a matter, one of the primary matters, on which the jury now are called upon to pass, that is, a question of a contract, and that involves the acceptance,—to let a witness say that there was no acceptance would merely be a conclusion.

The Court: I understand your point perfectly, but I say there must be some way by which this man can testify whether any proposition on his part has been accepted.

Mr. McKeever: I am willing to suggest to counsel the way that can be done.

[fol. 293] The Court: How would this be? Have you received anything in writing from the Champlin Company in relation to any alleged proposition on your part, covering this treater?

A. The answer to that would be yes.

(Question and answer read by the Reporter.)

By Mr. Marsh:

Q. You refer, of course, to correspondence?

A. With reference to that question, the question says "on your part."

The Court: You refer, I understand, to the letters and telegrams already in evidence?

A. Yes, sir.

Q. Have you received anything else except the telegrams, in writing?

A. No, sir. May I confer with counsel?

The Court: Yes.

(The witness conferred with his counsel.)

The Court: Have you received any verbal communications from them concerning your proposition, other than what you have testified to?

A. No, sir.

The Court: Doesn't that cover it?

Mr. Marsh: I want to ask just one more question, if I may, Your Honor, and see if it is satisfactory.

Q. Have you received any communication of any kind with reference to the proposal or any proposal for the installation of a Cross Vapor Phase treating system at the Champlin Refining Company plant, which indicated to you that the Champlin Company was ready to pay for it?

The Court: That last part is objectionable—"which indicated to you." That is objectionable. That must be

eliminated. We don't know what he might consider. Exclude it.

By Mr. Marsh:

Q. In the testimony of one of the witnesses yesterday the reference was made to the purchase of the Cross Engineering Company by the Kellogg Company. Will you state approximately when that purchase was consummated?

A. I think it was in June, 1926.

[fol. 294] Q. What was done with the Cross Engineering Company after you completed the purchase?

A. The Kellogg Company took over the assets of the Cross Engineering Company. The Cross Engineering Company was continued for a time as such, and gradually passed out of existence, being succeeded by the Kellogg name, the Kellogg Company taking over its business however.

Cross-examination.

By Mr. McKeever:

X Q. Mr. Harvison, when was this M. W. Kellogg Company organized?

A. The present corporation, which is a Delaware corporation, was organized, I think, in 1920. That succeeded a New Jersey corporation, which went back a great many years. I don't remember the original date of incorporation.

Q. The present Kellogg Company is the one that was in existence at the time of these negotiations in question?

A. Yes, sir.

Q. How long have you been connected with the Kellogg Company?

A. Since 1912.

X Q. Then you were connected with it prior to the date of the reorganization?

A. Yes, sir.

X Q. Well, I will ask you this: Who in the Gasoline Products Company is interested in the M. W. Kellogg Company?

A. No one, so far as I know.

Mr. Marsh: I object to that question, Your Honor, in that form.

The Court: Those are the questions you asked Mr. Champlin, who was interested with him in his company.

Mr. Marsh: Well, I might have been wrong then and right now.

The Court: I think on cross-examination he may ask it.

Q. Are any of the members of the Kellogg Company interested in the Gasoline Products Company?

A. No, sir.

Mr. Marsh: Again I object, because I think he ought to confine his answers to the period with respect to which this trial is concerned. What is the condition to-day is utterly immaterial to this trial.

[fol. 295] The Court: I think you better go back to the time in question.

Mr. Marsh: I mean at the time of the negotiations with Champlin.

A. No one in the Kellogg Company was interested in any way in the Gasoline Products Company during that time, nor was anyone in the Gasoline Products Company interested in the Kellogg Company during that time.

X Q. Now you say that the Kellogg Company had a contract with the Gasoline Products Company to sell these Cross cracking plants?

A. Yes, sir.

X Q. How long had you had that contract?

A. Since February 1, 1924.

X Q. As I understand your testimony, the Gasoline Products Company was the company which owned the patent rights on the Cross cracking process?

A. Yes, sir.

X Q. That company never constructed these plants, did they?

A. No, sir.

X Q. So your company made a contract with the Gasoline Products Company that you had become the constructing engineers for the Gasoline Products Company. Did you have that exclusive right?

A. No, sir, and we did not become the constructing engineers for the Gasoline Products Company. Our con-

tract gave us the right to procure licenses for the Gasoline Products Company. The Gasoline Products Company never constructed any plant. We were allowed to negotiate the construction and the sale for the construction of the Cross plants with the licensees, but those deals were deals entirely between the Kellogg Company and the licensees; the Gasoline Products Company had nothing to do with that.

Q. Did the Gasoline Products Company ever build a plant after you made that contract with them, that you didn't put up?

A. No, sir.

Q. So that you in effect were the exclusive builders?

A. We never built a plant before we made that contract. [fol. 296] We were not the exclusive builders, no, sir. Our contract was not an exclusive contract.

Mr. Hale: I don't think he understood your previous question.

The Court: There is some misunderstanding here.

X Q. Did anybody else construct these plants after you got your contract?

A. Some licensees constructed their own.

X Q. There was no other construction company that had the right to sell the licenses but yours, was there?

A. No, sir, no other one.

The Court: There were other people outside of construction companies that had a right to sell, were there not?

A. I can't answer that question, Your Honor.

By Mr. McKeever:

X Q. Did the Kellogg Company once have an office in Kansas City?

A. Yes, sir.

X Q. Who was in charge of that office?

A. Originally Mr. Harcourt. Following Mr. Harcourt, the Cross Engineering Company was in charge of our office.

X Q. The Cross Engineering Company the Kellogg Company, you say, purchased, but that was in June, 1926?

A. Yes, sir.

X Q. So that when these negotiations started Keith had succeeded Harcourt as an agent to sell the license agreements, but your company hadn't taken over the Cross Engineering Company at that time, of which Keith was the president?

A. We didn't take over the Cross Engineering Company until June. The Cross Engineering Company succeeded Harcourt as the Kellogg Company representative in that field.

X Q. When?

A. In December, 1925.

X Q. Now the Cross Development Company—was there any connection between that company and the M. W. Kellogg Company?

A. No, sir.

X Q. Was any member of your Kellogg Company interested in the Cross Development Company?

A. No, sir.

[fol. 297] X Q. Now Thomas T. Gray, or he and his brother, together, had perfected the Gray towers, and they claimed to own the patents on those towers, didn't they?

A. I understood so.

Q. So that was there any connection between your company and the Gray Processes, I believe, was their corporate name, was it not?

A. Yes, sir.

Q. At the time these negotiations commenced with Champlin?

A. No, sir, there was no such connection.

Q. When did you finally commence negotiations with the Gray Processes Company or the Gray Brothers to obtain control of their company?

A. Those negotiations started, as nearly as I can remember, in the summer of 1926. I don't remember the exact date of the starting of the negotiations. They were consummated in December, 1926.

X Q. They started between the time you met Mr. Gray at Enid and the time of drawing up the contract, which you say was in December?

A. Yes, sir.

X Q. You had had some negotiations with Mr. Gray,—your company had,—with reference to taking over the

Gray Processes Corporation prior to the time Mr. Glasser and his associates were at that conference in New York, May 19th, had you not?

A. The 18th. I don't know, Mr. McKeever, whether we had or not. I don't remember.

X Q. Had you and Mr. Gray friendly relations at the time Glasser was in New York?

A. Yes; I think so.

X Q. And now I am speaking of you and Gray personally?

A. I think so. I can only speak for myself.

X Q. That is all I am asking about. Now, I believe you said yesterday,—you used this expression, that the Cross Development Company "was not in the picture." What did you mean by that?

A. Not in the Kellogg Company picture I meant. I meant there was no connection; never was and never has been, between the Cross Development Company and the M. W. Kllogg Company.

[fol. 298] X Q. Do you know what the Cross Development Company,—what its business was?

A. Only by hearsay.

X Q. On January the 12th, 1926, Mr. P. E. Slater, you said, came to New York representing the Champlin Company, and he visited you at your office?

A. January 8th I believe. I don't recall that Mr. Slater visited our office, but I did have lunch with Mr. Slater and Mr. Keith at the Biltmore Hotel in New York.

X Q. Was any person other than you three present at your conference when you were discussing this treating tower situation?

A. No, sir.

X Q. You said you called Slater's attention to the fact that the Cross towers had never been commercialized, and you also said that you said nothing to Slater about the Gray processes?

A. I said that I said nothing about the Gray processes——

X Q. But you did discuss the Gray patents?

A. Yes, sir.

X Q. You attempt to convey to the jury the idea that you were warning Slater against the Gray patents, and you

also, as I take it, are stating in substance that if the Champlin Refining Company should buy the Cross vapor phase system with the copperized clay that it might be an infringement upon the Gray processes patent and it might lead to litigation?

A. Yes, sir; that is what I believed and what I said.

X Q. And that is what you said?

A. Yes, sir.

X Q. Now, you claim that Keith was an agent for the sale of the Cross cracking units working through you?

A. That is right, yes.

X Q. Your company when I say "you"?

A. Working through the Cross Engineering Company and the Cross Engineering Company in turn through the

X Q. But you recognized Mr. Keith in any of his activities as a personal agent with authority at least of the Kellogg Company to sell these cracking units?

A. Yes; through those channels of course.

X Q. Whatever he did in that regard was as agent for your company, was it not?

A. Whatever he did with respect to the sale of the license [fol. 299] for a cracking plant or with respect to the sale of the contract for constructing a cracking plant was for our company.

X Q. Whatever he did with reference to his representations as to the Cross vapor phase treating towers do you say that that was not for your company?

A. That wasn't for our company, no, sir. Our company wasn't interested in any way in that situation.

X Q. At that time?

A. At that time.

X Q. Do you know who he was representing when he would make those representations about this Cross vapor phase treating tower?

A. I can't answer that, no sir.

Q. Did you know this patent attorney down at Kansas City that the plaintiff company had here the last trial in counsel?

A. You mean Mr. Schofield?

X Q. Yes?

A. Yes, sir.

X Q. How long have you known him?

A. Since about 1924. I don't remember when I did meet him first.

X Q. Do you know who he was attorney for when these negotiations were going on with Champlin?

A. You mean as between Gasoline Products and Cross Development, etc.?

X Q. Yes?

A. I do not; no.

X Q. Did you have any information on the subject at all?

A. No.

X Q. Did you have any information when you were down to Enid on the fifth and sixth of February that Keith brought Schofield down there?

A. That he had brought him there?

X Q. Yes?

A. No, sir; I don't think he had brought him there at that time.

X Q. You knew they were there?

A. I don't think they were there before that.

X Q. If the evidence shows that they were there before that, you knew about the circumstance?

A. No, sir. It was discussed while I was in Enid.

[fol. 300] X Q. With who?

A. With Mr. Champlin and Mr. Keith, the advisability of bringing Mr. Schofield to Enid to discuss the patent situation was discussed. So far as I know Mr. Schofield had never been there up to that time.

X Q. I will ask you, if the evidence shows as a matter of fact that Schofield was there on February the first, five days before you were there, if you did not know it at the time that you were down there?

A. I don't think I did. I don't have any knowledge of any kind that Mr. Schofield had ever been there before I was there. I am sure that if he had been I didn't know it at that time.

X Q. Well, then, you say when you were there Schofield was discussed?

A. Yes, sir.

X Q. And was he to be brought down to see Champlin?

A. Mr. Champlin asked if Mr. Schofield could not be brought down to go over the patent situation with him.

X Q. How did Champlin ever find out or learn who Schofield was?

A. I don't know, sir. I had no direct interest in that proposition.

Mr. McKeever: I am not asking you that, and I would ask the Court to please admonish the witness.

X Q. Now, Mr. Harvison, can you give this jury the reason why that matter was discussed about Schofield coming down—take your view of it—afterwards to convince Champlin concerning the Gray patent, and that Cross's was no infringement? That is what they were talking about, isn't it,—in the face of your telling Champlin he had better not buy this vapor phase treating tower of the Cross people because it might infringe on Gray?

A. I could tell the jury what my understanding was.

X Q. I don't want your understanding. I want what the facts were?

The Court: You are not asking about facts. You are asking about his mental attitude.

By Mr. McKeever:

X Q. Answer it in your own way; I don't care?

A. My understanding was Mr. Champlin wanted to get [fol. 301] more information about the patent situation and asked to have Mr. Schofield brought down for that purpose, for the purpose of discussing the patent situation with him.

X Q. Now, Mr. Harvison, whether it was Champlin's request, or Keith's or somebody else's request that Schofield should elucidate further on the relative conflict of these two alleged patents, it is a fact that Schofield was discussed and his knowledge of these two patents, wasn't it?

A. Yes, sir.

X Q. And that he was the man who could show Mr. Champlin that the Cross vapor phase towers with the copperized clay was not an infringement of Gray's patent?

Mr. Hale: To that we object.

A. No, sir; I couldn't say that.

X Q. What was he going to do with Schofield?

A. He was going to find out from Schofield, as I understood it, what Schofield did think. I had no preconceived

idea what Mr. Schofield's opinion was. I never talked with him about it.

X Q. Don't you know that he was coming down as attorney for the Cross's?

A. I don't know whether Mr. Schofield was representing Cross Engineering Company, Cross Development Company or the Gasoline Products Company specifically. I knew that he was an attorney for someone or all of them; presumably the Cross Development Company; but that was only hearsay on my part.

X Q. But you did know that he wasn't representing Gray?

A. I knew he wasn't representing Gray; yes, sir.

X Q. You did know that he wasn't trying to uphold the Gray patents, didn't you?

A. No, sir; I don't know what his opinion was.

X Q. But you did know that Cross claimed a patent and Gray claimed one? You knew that?

A. Yes, sir.

X Q. And you know Schofield was attorney either for one of these Cross companies or the Gasoline Products Company, didn't you?

A. Yes, sir.

[fol. 302] X Q. And yet, in the face of that discussion there, you claim now that you told Champlin the same thing that you told Phil Slater in New York and warned him against the Gray patents?

A. Yes, sir; I did.

X Q. And at the same time representing the Kellogg Company trying to close the deal with him for the Cross cracking units?

A. Yes, sir; that is correct.

X Q. Did you rebuke your alleged agent, Mr. Keith, for trying to sell Champlin this Cross treater and put him in trouble as against the Gray patents?

A. It wasn't any of my business what Mr. Keith did representing the Cross Engineering Company interests outside of the work for the Kellogg Company.

X Q. It was some of your business to get a contract to construct this plant, wasn't it?

A. Yes, sir.

X Q. And charge this four hundred and some odd thousand dollars for it? You were interested in that, weren't you?

A. Yes, sir.

X Q. Were you sufficiently interested in that to caution Mr. Keith about knocking the sale by having these patent discussions mixed up in it and steering Champlin clear from any of those complications?

A. I think I did tell Mr. Keith at one time that I thought we,—meaning the Kellogg Company when I say we,—that we ought not to make any recommendation on the treating plant situation; that I was afraid that there might be trouble about it later, and I didn't want the Kellogg Company mixed up in it.

X Q. Why didn't you tell that to Mr. Champlin that way, while Mr. Keith was present, and stop that thing right there?

A. I did tell Mr. Champlin. That is precisely what I told Mr. Champlin and told Mr. Slater.

X Q. And told them in the presence of Mr. Keith?

A. Yes, sir.

X Q. And still Keith was permitted to go on and try to sell him the Cross cracking units with the Cross Tower?

A. Not the Cross cracking units with that Cross tower. I had no authority over what Keith did about the Cross tower.

[fol. 303] X Q. You knew, before you left Enid, that Mr. Gray was there in Enid? Met him in the Oxford Hotel?

A. Yes, sir.

X Q. And you and he either had a fight or row or cussing match? That is, kind of a falling out about that? Didn't you?

A. I don't think it was as strong as that.

X Q. Well about how strong was it?

A. I met Tom Gray, whom I have known for years, and he said, "What are you trying to do——

Mr. McKeever: Well, I object to that. To what he said.

X Q. I ask you——

Mr. Hale: My brother asked him the nature of the conversation with Gray and the witness starts in to give the conversation he had with——

The Court: No. He didn't ask him that. He simply asked him how strong it was. The witness had said it wasn't as strong as that, as I understood him; and he asked him how strong it was. And he went on to give the conversation.

A. I think I can characterize that conversation by saying that it was half kidding and half serious. There was nothing whatever in the nature of a row.

X Q. Well, it was sufficiently strong that Gray's deposition—you have read that deposition?

A. No, sir. I have not.

X Q. Mr. Gray—If Gray in his deposition characterized that as him being sore—I think that is the term he used—that would indicate that Gray was sore? He was sore, at that time, wasn't he?

A. Well, of course, I can't tell you what he was.

X Q. Did you get mad with him?

A. No, sir.

X Q. Were any blows passed?

A. No sir.

X Q. You didn't get that strong?

A. No.

X Q. Well, anyhow, the trouble did come up and this was at the very time that you and Mr. Keith were down there trying, as you say, to close Champlin's contract?

A. Yes, sir.

X Q. Now, you say Keith asked you to meet him at Enid, and you went for the purpose of negotiating and signing the contracts? That is your language?

A. That is correct. Yes, sir.

[fol. 304] X Q. Now, did you—I believe you said later that you thought the sale was closed with Champlin when you started to go down there?

A. I did. Yes, sir.

X Q. Then if it was closed, what was the use of you going down? All he had to do was to sign his contracts.

A. The contracts hadn't been prepared. I had to go down to prepare the contracts and agree with Mr. Champlin on the exact wording of the contracts.

X Q. Well, now, getting to the wording of the contracts; as far as the license agreement was concerned, you said, I believe, that you merely used the Marland contract, or others, that had been used; you followed them?

A. In substance.

X Q. In substance. Yes.

A. Yes, sir.

X Q. That was easy enough to dictate by simply changing the company, and so forth? The name?

A. Right.

X Q. It was the uniform contract which the Gasoline Products Company uses to their lincensees?

A. Yes, sir.

X Q. So the M. W. Kellogg Company contract was merely a contract that was one that you had used on others, except of course each company had its terms of payment? Each customer?

A. Yes, and each customer had his own ideas of various other clauses in the contract. It is always necessary to discuss all of those clauses in the contract.

X Q. And, of course, you had to have the—you had to know what the Gasoline Products Company was going to guarantee Champlin, in order to draw the guarantee. So you merely used the form of contract there that they had used before?

A. Yes.

X Q. You went prepared with those kind of contracts so you could do that?

A. Yes.

X Q. Where did you get the stenographer to make those contracts?

A. I think we got a stenographer in the hotel. In the Oxford Hotel.

X Q. Did Mr. Keith help you prepare them?

A. I think so. My recollection is that Mr. Keith was there with me at that time. Presumably he helped. Yes, sir.

[fol. 305] X Q. And when did you first present these written contracts to Mr. Champlin for his information? That is his investigation of them?

A. My recollection is that they were presented to Mr. Champlin on the morning of February sixth.

X Q. You had had a conference with him on the morning—on the fifth—hadn't you?

A. Yes, sir.

X Q. And the terms and all were discussed there? By you and Mr. Champlin and Mr. Keith too?

A. Yes, sir.

X Q. So you withdrew to the hotel for the purpose of drawing up the contracts?

A. Yes, sir.

X Q. And when you came back you think you brought the contracts prepared, the next morning?

A. I think the contracts were delivered the next morning. I don't remember exactly the circumstances of the delivery. I mean, I don't remember whether I handed them to Champlin, or whether Mr. Keith handed them to him—to Mr. Champlin—or just what the circumstances were.

X Q. You went down to his office, did you? You and Mr. Keith?

A. I think so. I am not sure about that. My recollection is not clear about that.

X Q. I want you to give me your best recollection as to who handled the actual, physical contracts that morning, and the delivery?

A. I am sorry, but I haven't the slightest recollection of how those contracts were delivered to Mr. Champlin. I do remember that I left Enid on the late morning train. My recollection is that some time during the morning before I left the contracts were delivered to Mr. Champlin, but whether he came to the hotel and got them there or whether I took them to his office or whether we took them there together, I don't remember.

X Q. What railroad did you go out on? The Frisco——

A. I don't remember that, either. I went directly back to New York, if that would help you any. My recollection, Mr. McKeever, of the time of the departure of the train, was that it was some time between eleven and twelve o'clock.

[fol. 306] X Q. Now, you say this letter of Keith's, signed Cross Engineering Company, dated February 6, 1926, which you are now familiar with, of course——

A. Yes, sir.

X Q. (continued). —that you didn't know anything about that?

A. No. I didn't.

X Q. Didn't Keith prepare that letter up there at the same time you and he were preparing those contracts?

A. I don't know, sir.

X Q. And you claim no knowledge of him having that contract and that the four instruments were delivered to Mr. Champlin at the same time?

A. No. I can't say the four instruments were delivered at the same time. I can only say I had no knowledge whatever at that time of the letter of February sixth which you refer to.

X Q. But you did have knowledge that Mr. Champlin had under consideration the Cross vapor phase system treating towers?

A. Yes. I knew that.

X Q. And you did have knowledge that Keith was urging him to take them?

A. No. I can't say that, Mr. McKeever. I know Mr. Keith had talked to Mr. Champlin about them. I can't say that Mr. Keith was urging him to take them. I don't know that that is so.

X Q. Well, couldn't you draw any conclusions or couldn't you positively tell, when you were discussing it there in Mr. Champlin's office, about the virtue of these patents, whether Mr. Keith was or was not urging Mr. Champlin to take the Cross tower?

A. Mr. Keith wasn't urging Mr. Champlin to take the Cross tower while I was there.

X Q. I'll ask you if it is not a fact that on that visit, while you and Keith together were trying to close Mr. Champlin on your cracking units, that he told you——

A. (Interrupting.) Keith told me?

X Q. No. That Mr. Champlin told both of you that he would buy your cracking units and install them and buy the license, rather, and your Kellogg Company should erect [fol. 307] them—he would sign that contract—if the Gasoline Products Company would give him in connection with these Cross units the Cross treaters royalty free?

A. No, sir. That isn't a fact.

X Q. Did you hear of any such proposition while you were down on the fifth or sixth?

A. What do you mean by "such proposition"?

X Q. The proposition that if Mr. Champlin would buy the Cross cracking units and sign the contract for Kellogg & Company to construct it, the Gasoline Products Company would give him royalty free, a Cross tower?

A. Yes. I knew there was such a proposition.

X Q. How did you know it?

A. By general discussion.

X Q. With whom?

A. With Mr. Champlin, and Mr. Slater, in New York.

X Q. Now, didn't you know that there was such a proposition from this Mr. Keith, that you claim was agent. He had to be on the other end of the business, didn't he?

A. A letter.

X Q. No. Oral?

A. I knew that an oral proposition had been made to the Champlin Company. I presume it was made by Mr. Keith.

X Q. You weren't sufficiently interested in the activities of your agent Mr. Keith, who was trying to sell a plant in which you were to profit by the construction, to find out whether or not he was trying to put over—or trying to throw in with that a Cross treater?

The Court: Your question is extremely argumentative, and also susceptible of being divided up, a good deal, I think, Mr. McKeever.

Mr. McKeever: I am trying to go to the question of his knowledge at that time, if the Court please, of course. Well, perhaps it is.

X Q. When was it you first knew about the fact that Mr. Keith was offering the Cross treater towers in connection with the plant that you were to construct?

A. I believe it was during Mr. Slater's visit to New York in January.

[fol. 308] X Q. So you had that knowledge that Keith was trying to put them in with his sale before you came down there in February?

A. I had the knowledge that the proposition had been made.

X Q. By Keith?

A. Through Keith.

X Q. Through Keith?

A. Yes, sir.

X Q. Now, the Gasoline Products Company entrusted you, in the sales you made for them, to draw their contracts? Draw their contracts for them and send them back with the signature of the licensee on them?

A. For their final approval.

X Q. Yes. For their final approval?

A. Yes, sir.

X Q. Was it then, and has it been since, your duties to go to all of these places where your agents are selling these licenses, and close the deal?

A. No, sir. It was not then, nor has it been since.

X Q. How many do you ever feel personally called upon to go and close?

A. How many do I feel called upon to go and close?

X Q. Yes. How many do you feel personally called upon to go and close?

A. A good many. I went on that particular job because it was the first job that Mr. Keith had closed; and I wanted to go down and be of what assistance I could to him in the final closing out and writing of the contracts.

X Q. Was it then and has it been since your duty to go to all these places where your agents are selling these licenses and close the deal?

A. No, sir. It was not then. It has been since.

X Q. How many of them did you ever feel personally called upon to go and close?

A. Well, I have closed a good many; went on that particular one, because it was the first job that Keith had closed and I wanted to go down and be of what assistance I could to him while closing up and writing out the contracts.

X Q. You could have sent Keith these contracts, couldn't you?

A. I could have sent Keith the contracts, but I felt it was my experience with the company I might be better able to represent the Kellogg Company and Gasoline Products Company than Mr. Keith.

[fol. 309] X Q. What made you say that when you said Keith already had it closed? What was there for you to do, except hand Champlin the contracts?

A. Mr. Keith had wired me that Mr. Champlin was ready to buy, that he was ready for the contracts. I could have sent Mr. Keith the draft of contracts. Whether Mr. Keith would have been in a position to explain the terms of the contracts I do not know. I went along for that purpose.

X Q. What I am getting at is, you said that you went down there believing it was closed. Is that the way you interpreted the telegram that Keith sent you?

A. When I said "closed" I meant that I understood Mr. Champlin had signified his readiness to sign the contracts when they were presented to him.

X Q. And you didn't want to trust Keith with the terms of—these supertype terms and the Gasoline Products Company have, that you felt the necessity of going down yourself?

A. I felt that was part of my job, yes.

X Q. Now you didn't close it, did you?

A. No, sir.

X Q. The terms that you and Champlin agreed upon providing you knew he was getting his loan, of course?

A. Yes.

X Q. The terms you and Champlin agreed upon provided he finished his loan were apparently satisfactory when you left the office, weren't they?

A. Yes, sir.

X Q. But in the meantime when Keith came back Mr. Champlin decided that it would be more convenient for him to ask for some different terms, vary the terms of payment, and you acceded to that, and the contract was changed and sent back and signed with the changed terms of payment. That is right, isn't it?

Mr. Marsh: The second part of the question is all right, but he starts out with a long preface as to what Mr. Champlin had decided and what he had in his mind and all that sort of thing. Mr. Harvison can't know what that was.

The Court: It would be better if you would eliminate the different assumptions in framing your question. Such assumptions might be subject to argument.

[fol. 310] Mr. Marsh: Mr. Harvison can answer the second part perfectly, and I have no objection to his answering the second part.

The Court: It is a double barreled question.

Mr. McKeever: If the Court please, I am going to be as good as I can about that. Of course I am following my own notes and these must appear to the Court and counsel as assumptions, and may I for my own defence say that I am basing the question on what he had testified before, in order to get a conclusion. Now I may be a little long.

Mr. Marsh: He hadn't testified as to what Mr. Champlin thought.

The Court: In your own mind you were, in a way, arguing it. I think in your own mind you were in a way arguing it. It would be better, it seems to me, if you defer all argument until later.

Mr. McKeever: Of course I am asking leading questions that are in a measure argumentative.

The Court: You have a perfect right to ask leading questions on cross-examination. Read the first part of his question.

Read as follows: X Q. But in the meantime when Keith came back Mr. Champlin decided that it would be more convenient for him to ask for some different terms, vary the terms of payment?

Mr. Marsh: That is the part I object to.

Mr. McKeever: That is relating to what he testified before as a foundation, and now what I am asking him to answer.

The Court: You ask him about the intention. Is that true? Is that what he testified to? I think the evidence is to that effect.

Mr. Marsh: Oh, yes, surely.

Mr. McKeever: I think when I am understood that I am right.

Mr. Marsh: I don't question there were changes made in the contract, Your Honor, but he is predicating this question on some decision in Mr. Champlin's mind I am sure Mr. Harvison didn't testify to Mr. Champlin had decided.

Mr. McKeever: Let me clear that up.

[fol. 311] X Q. Didn't you testify that Champlin wanted the change in the terms of payment and had made up his mind to that effect and made the request of you?

A. I testified about Mr. Keith's telephone call to me. I said what Mr. Keith said to me.

X Q. Yes.

A. And I believe that part of my testimony was stricken out.

The Court: It developed here Mr. Champlin wanted a change of terms. You are sure of that?

A. That is right.

X Q. So that is what happened, Champlin wanted the change of terms of payment, wasn't it?

A. Yes.

X Q. You didn't want it?

A. No, sir.

X Q. You wanted to accommodate him?

A. Yes, sir.

X Q. What is the last part of my question?

Read as follows: And you acceded to that, and the contract was changed and sent back and signed with the changed terms of payment. That is right, isn't it?

A. The contract was changed in Enid and sent back to New York with the clause the terms of payment closed re-written. That was right.

X Q. Now you testified yesterday that when the contracts were delivered to Mr. Champlin when you were present on the 6th I will say of February, that Champlin did say he hadn't made up his mind about a treater yet and would not for probably sixty days?

A. I said that Mr. Champlin said that to me before I left Enid.

X Q. Well, I don't care about——

A. I don't remember whether it was on the occasion of the contracts being delivered to him or not. It was that morning.

X Q. Now I will ask you if it isn't a fact that Mr. Champlin said to you and Mr. Keith that "I can't sign the contracts until my loan is closed, and I have been trying to close my loan for sixty days," and that is where the sixty days come in and you got your impression? Don't you remember that?

A. That is not quite my recollection. Mr. Champlin stated that he had been trying to close the loan for some time, that he expected to have it closed any time—any [fol. 312] day thereafter. That time had absolutely no reference to the sixty days which he told me he would probably take for deciding about his treating plant. I am perfectly clear in my recollection about that.

X Q. Now did you see Mr. Gray after you left Champlin's office, over to the hotel?

A. I didn't see him. If I did see him I didn't see him to speak to him. I didn't speak to him. I don't recollect seeing him at all.

X Q. Did you convey to Mr. Gray in any way the intelligence that Champlin hadn't closed for a treater?

A. I have no recollection of discussing that particular point.

X Q. To whom were the contracts delivered after they were signed up by Champlin?

A. I presume they were delivered to Mr. Keith. They were forwarded by Mr. Keith to me in New York.

X Q. All of them?

A. Yes, sir. Three contracts. Construction of the Cross cracking plant, the Gasoline Products license, and the Gasoline Products guaranty.

X Q. You I believe stated yesterday that you delivered those to the Gasoline Products Company?

A. Except the construction contract.

X Q. Except the construct-on contract, and the guaranty contract now was sent to Dr. Cross at Kansas City for his approval?

A. For his approval of the technical guaranty; yes, sir.

X Q. That is, you knew that by the information you had in having the contracts properly passed upon and finally consummated?

A. I knew that through a letter received from Gasoline Products Company transmitting the license contract back to us, advising us of the disposition of the guaranty contract.

X Q. Now after the signing of the contract with your company you proceeded to construct the plant for Mr. Champlin, and when I say him I mean the Champlin Refining Company?

A. Yes, sir.

X Q. Mr. Mike Hayes was your superintendent out there, wasn't he?

A. Yes, sir.

[fol. 313] X Q. After the controversy arose, some controversy you testified that Mr. Glasser and Jamieson and Jackson came to your or somebody's office in New York at which you were present?

A. Yes, sir; at my office.

X Q. That was on May the 13th——

A. The 18th.

X Q. May the 18th, and you had Mr. Ramsey Hoguet there present?

A. Yes, sir.

X Q. Is his office in conjunction with yours?

A. No, sir. His office is in New York City, however, nowheres near ours.

X Q. Your office was at——

A. Our office at that time was at 7 Dey Street.

X Q. That is in New York City?

A. That is in New York City.

X Q. At whose office was this meeting?

A. At our office at 7 Dey Street.

X Q. Did you call Mr. Hoguet over for the conference?

A. Yes, sir.

X Q. What for?

A. To have him there to discuss patents with Mr. Glasser, Mr. Glasser had asked us or asked some one to have Mr. Schofield. Mr. Schofield was not available, so we asked Mr. Hoguet to come in his stead.

X Q. Did Hoguet give an opinion on the question as to the conflict of patents between the Cross treater and the Gray treater?

A. Yes, sir.

X Q. In substance what was his opinion, for Gray or against Gray?

A. For Gray.

X Q. At that time you and Gray had become friendly, hadn't you?

A. I wouldn't say that we were ever anything but friendly.

J Q. All right. At that time you had commenced your negotiations to take over his Processes Company?

A. I am not sure whether we had or not, Mr. McKeever. I have testified on that point several times before. We started those negotiations sometime during that summer. Whether they had started at that particular day on May 18th, I don't know.

[fol. 314] X Q. What did you put the contract in escrow for that you finally made with him?

A. The contract was put in escrow for sixty days after it was made pending the accomplishment of the settlement of this Champlin treating matter.

X Q. Have you got the contract with you, or a copy of it?

A. No, sir, I have not.

X Q. Have counsel here?

A. I think not.

Mr. Marsh: No, we haven't.

X Q. You knew at the time Hoguet said the Gray patent was in his opinion being infringed upon by the Cross—alleged patent?

Mr. Marsh: Just a minute. There has been no testimony of that kind that I know of. There again you are arguing what Mr. Hoguet's opinion was. You asked him, was Mr. Hoguet's opinion for Gray or for Cross. He said it was for Gray.

The Court: As between the two processes.

Mr. Marsh: He didn't define whether it was between the patents or between the processes, whether it was a question of the Gray patent being good or whether it was infringed.

The Court: I know he didn't, but I think everybody understood it was between the two processes. What did you mean by being for Gray? Explain that?

Mr. McKeever: All right.

X Q. Mr. Harvison, you knew at that time that Mr. Glasser was there that when Mr. Hoguet was maintaining by his opinion that the Cross process was an infringement of the Gray process, Mr. Schofield had visited Enid with Mr. Keith your agent, who brought Schofield from Kansas City, with different arguments that it wasn't an infringement? You knew that?

A. I knew Mr. Schofield had been in Enid with Mr. Keith.

X Q. Now would you mind telling us just what the limitations were on your knowledge with reference to the purpose of Schofield down there and the knowledge you had on the day that Hoguet was rendering his opinion to Glasser?

A. I knew that Mr. Schofield had gone to Enid to discuss [fol. 315] the patent situation with Mr. Champlin and to

give Mr. Champlin such of information as he had. I presumed to render an opinion to Mr. Champlin.

X Q. In behalf of the Cross process?

A. I knew in a general way by hearsay that Mr. Schofield's opinion on the patent situation did not agree with that of Mr. Hoguet's, if that is what you want me to say.

X Q. That is exactly what I want you to say. Now you testified that you told Mr. Glasser that it was not safe to use the process on account of the danger of being sued by Gray or the Gray Processes Corporation?

A. Yes, sir, I told him that in our opinion if he used the process, he would be sued by Gray.

Mr. Marsh: Will you speak a little louder, Mr. Harvison.

X Q. Does your company now own the Gray Processes Corporation or the rights it had at that time?

A. Our company now has a contract with the Gray Processes Corporation which gives us sales rights for Gray licenses in connection with certain specified cracking processes.

X Q. Have you any financial interest in the selling of Gray licenses?

A. Only through that contract.

X Q. Is the only advantage that your company has that it is an advantage to you in selling the Cross processes so that you can have the construction of the plants?

A. The Cross processes?

The Court: Gray.

X Q. No; the Cross cracking processes.

A. The advantage to us in selling Cross processes, Cross plants, is first that we may build the plant and endeavor to make some money that way. Secondly, very often times we are able to sell other refinery equipment and make a little money that way. And, third, we share in a small way in the royalty received from the Cross plants.

X Q. In about how small a way in the royalty received? What is your return on that?

Mr. Marsh: Are you asking, Mr. McKeever, in relation to 1926 or 1929?

The Court: 1926.

[fol. 316] Mr. McKeever: Do you mean the royalty received by the Gasoline Products Company or the Gray Processes Corporation?

A. We are talking about Cross and Gasoline Products. You said Cross plants, Cross cracking plants.

The Court: He says you asked him about the Cross.

A. Yes, during 1926, we received to our credit a percentage of the Gasoline Products Company's net royalties, not the gross royalties, the net royalties. That percentage, I think, I am not sure of my figure, was 25% of which we received either two-fifths in cash, or three-fifths, toward the purchase of stock in the Gasoline Products, or vice-versa. I don't remember which way, three-fifths or two-fifths of it. I think it was two-fifths cash and three-fifths towards stock.

X Q. Can you tell me just when you entered into that arrangement?

A. That arrangement was made February 1, 1924.

X Q. Then at the time of selling the Champlin plant you were so interested, as you have stated?

A. To the extent of whatever that interest had become.

X Q. Then, when you said your company had no connection with the Gasoline Products Company, it did have the connection that you now say?

A. I beg pardon. That question was not asked. You asked me whether any individual in the Kellogg Company had any connection with the Gasoline Products Company. I said "No." That was true.

X Q. Now you are interested, then, your company, in the returns from the License Agreement which the Gasoline Products Company made with Champlin, aren't you?

A. Yes, sir.

X Q. So that in that measure your company is interested in the result of this litigation financially?

A. Yes, sir.

X Q. As the evidence shows here, if the plant had been run on its guarantee and would make a return of approximately $10,000 a month for the Gasoline Products Company, how much of that $10,000 would your company receive under your contract?

Mr. Marsh: Again referring to 1926?

[fol. 317] Mr. McKeever: Referring to the Champlin contract, '26 or now even. Any month.

A. Roughly about a thousand dollars.

X Q. Then your contract would be for approximately one-tenth of the royalty earnings?

A. Yes, sir.

X Q. Have you figured up so that you can state what your present financial interest is in this litigation, up to the present time, under that contract?

Mr. Hale: Just a minute.

The Court: That would be impossible to determine until he knows the result of the litigation. In dollars and cents, is it?

Mr. McKeever: Yes.

The Court: I don't see how he can tell that.

Mr. McKeever: It is contingent. I will change it.

X Q. I will ask you this, if you have figured up the interest your company has in these royalty earnings up to the present time?

Mr. Hale: Just a moment. That we object to.

The Court: I will sustain that objection. He has already stated he has approximately a tenth of these royalties—his company does.

X Q. You testified a while ago that your interest in the Gasoline Products Company was about 25%?

Mr. Hale: Just a minute. That wasn't the testimony.

The Court: With some limitations.

X Q. What are the limitations?

A. 25% of net royalties. The Gasoline Products Company pays off a large part of its gross royalties for the right to license its process under patents of other companies than its own, so that its net royalties are only approximately 50% of its gross royalties. Our interest is in the net royalties.

X Q. That is, you mean by that, that before you get your percentage the Gasoline Products Company has certain obligations which they must settle out of this gross income that go to all or some of these associated Standard Oil Com-

[fol. 318] pany patents that are attached to their contract?

A. It has those obligations and other obligations.

X Q. Now can you tell us who gets these royalties earned on the License Agreement and how much each gets before you get your division?

Mr. Marsh: I don't think that Mr. Harvison has been qualified in any way to answer that question. That has no bearing on the direct examination whatsoever.

The Court: The only bearing it has is as showing the interest the witness may have.

Mr. Marsh: Simply showing interest. He has said that 50% of royalties were paid to other people.

The Court: He has a right to inquire to a limited extent.

A. I can't tell you how that 50% is divided exactly, no, sir. I referred to other obligations in addition to that 50% before our interest appears. Those other obligations consist of the payment of percentages to G. M. P. Murphy & Company in New York, which is the company managing the Gasoline Products Company, and also, I believe, percentages of the royalties to Doctors Roy and Walter Cross. All of those things are deducted before the Kellogg Company's percentage is figured.

X Q. Did I understand you to say a while ago that your company owned some of the stock of the Gasoline Products Company?

A. Yes, we own some of the stock of the Gasoline Products Company, which has been acquired through the placing to our credit these percentages of the royalties earned on jobs we have sold for the Gasoline Products Company.

X Q. Did you own such stock in January, 1926, and through '26?

A. Yes, we owned a little, a very little.

X Q. Now who represents your company's stock at the meeting of the Gasoline Products Company, from your company?

A. Mr. Kellogg.

Mr. Marsh: I object to that.

The Court: I think he may answer in cross examination.

[fol. 319] X Q. Did you ever attend one of those stockholder's meetings for your company?

A. No, sir.

X Q. Do you know how much has to be paid to the Standard Oil Company of Idniana under its patents in this distribution?

A. No, sir.

X Q. Do you know how much has to be paid to the Standard Oil Company of New Jersey in this distribution?

A. No, sir, I do not. I don't know how that 50%, or approximately 50%, which I understand it is, is divided.

X Q. Is there a bank and trust company in New York that is interested in this distribution through the Murphy Company?

A. I think not. I don't know of any.

X Q. You said in your testimony that when Glasser was up there to your office that he expressed a desire to talk with Gray. I will ask you if it is not a fact that that suggestion came from Mr. Kellogg and Mr. Kellogg personally called Gray over the phone to make an appointment with Glasser and his friend?

A. It is a fact that Mr. Kellogg called Mr. Gray. I remember that, yes, sir. I don't recall that Mr. Kellogg made the suggestion.

X Q. Who did?

A. I think it came about in general conversation. I think we probably talked about the advisability of Mr. Glasser talking with Mr. Gray, and Mr. Glasser said he would like to do so.

X Q. Now you had no contractual relations, you say, with Gray at that time; but about that time you had started negotiations which culminated in a contract being put in escrow, dated September, 1926; and going back to your testimony now, that contract was placed in escrow pending this Champlin litigation, wasn't it?

A. Yes, sir.

X Q. It has been taken out of escrow, hasn't it?

A. Yes, sir.

X Q. Did you liquidate the Gray Processes Corporation?

A. No, sir; we never had any ownership in the Gray Processes Corporation.

X Q. Did you make this arrangement with the Gray Processes Corporation, under that contract, to sell in connec-
[fol. 320] tion with Cross cracking units the Gray process for treating because you thought that would aid you in

making sales of the cracking units that you were to construct?

A. No; I don't think we did. I think we made the contracts with Gray because we hoped to make some money out of the sale of Gray treating plants. I don't think we had in mind at the time specifically that that would stimulate the sale of Cross cracking plants. The Gray contract covered the use of their units with more processes than Cross's.

X Q. Yesterday, if I recall, you used the same term "stimulate," and said that one purpose of it was to stimulate the sale of the Cross cracking units. Now, what do you say about it?

A. I don't remember saying that.

X Q. I will come to that in a minute. I may be mistaken.

A. I think that was some other witness.

X Q. Now, you say you heard next about the treating towers controversy in July, 1926, when you received the telegram from Mr. Champlin?

A. I corrected that date to August. August fifth, I think.

X Q. So from that time on, Mr. Harvison, the whole history of this transaction as between you and the Champlin Refining Company is expressed by this correspondence and telegrams that is in evidence, isn't it?

A. I think so.

X Q. You asked for a copy of the Keith letter of February sixth, and received that from Mr. Champlin,—a copy of it,—in the mail?

A. Yes, sir.

X Q. When the controversy was going on?

A. Yes, sir.

X Q. Do you now, since acquiring the interest you have in the Gray processes patent, or your agency of it, do you now recommend the construction of the two plants together?

A. No, sir. If I understand your question correctly, you say we recommend the construction of the two together. There are cases in which we recommend the use of a Gray treating plant in connection with the Cross plant; but it is never our practice or policy to submit a proposition to the customer covering both a Cross plant and the Gray plant; that is what I mean when I say "no."

[fol. 321] X Q. Do you ever sell a Cross cracking plant and leave the buyer without recommending your Gray process?

A. Oh, yes. In fact, it is rather unusual to recommend——

X Q. What did you want the right to sell it for?

A. For the purpose of trying to make some money.

X Q. How can you make money if you don't recommend its sale?

A. We can't recommend the sale of the vapor phase treating with most of the plants that are being built now, because most of the plants that are being built now are being built to run on high sulphurous oil for which vapor phase treating is unsatisfactory.

X Q. But that is a recent practice, isn't it?

A. It has been the cracking practice for the last two years or so.

X Q. But when you made your contract with Gray you did not have that in contemplation? Now, if a plant is susceptible, and it would be the proper practice, to use the vapor you would recommend it, wouldn't you, to stimulate the sale of your other plant?

A. Yes, sir.

X Q. Now, Mr. Harvison, to clear up a discussion we had a while ago about acceptance, you did not mean to say that you did not receive the telegram from Mr. Champlin which I now read you, which is offered in evidence here—I can't give the recent number, but in the former trial "Exhibit A25"?

The Court: You mean which has been offered in this trial?

Mr. McKeever: Yes, Your Honor, "Exhibit 34" in this trial.

(Reading:) "Letter received. We again accept proposal of February sixth to install Cross vapor phase treaters but warn you they must do just what they were represented to do or we assume no liability. Dated October 26, 1926."

X Q. You did not mean to deny the receipt of that telegram, did you?

A. No, sir; we received that telegram.

The Court: The question I asked him was whether he received anything outside of those telegrams.

Mr. McKeever: I wanted to be sure.

[fol. 322] A. I acknowledged the receipt.

(Recess for ten minutes.)

Mr. McKeever: That is all with this witness.

Redirect examination.

By Mr. Marsh:

Q. Mr. Harvison, in several of the questions asked by Mr. McKeever with reference to the contract between the Kellogg Company and the Gray Processes Corporation, it was—which was signed in December, 1926—he referred to that contract as one which provided for Kellogg & Company obtaining control of the Gray Processes Corporation. Was there any such provision as that?

A. No, sir. No. The only compensation Kellogg & Company got out of that contract was through its profit on what plants it might build; what Gray treating plants it might build, and a small percentage of the royalties on those plants. There was no ownership in the Gray Company connected with the contract at all.

Q. Has the Kellogg Company any interest in the Gray Processes Corporation?

A. No, sir. No, sir.

Q. Will you state as to 1927—that is the first full year of the Gray contract approximately what percentage of your total income—that is, the Kellogg Company's total income—came from the Gray contract?

A. You mean net income, of course.

Q. Yes. Net income?

A. I don't remember specifically for 1927, but I can say this: In 1928 our percentage was, roughly, one-half of one per cent, of our total. It was approximately the same in 1927.

Q. Will you please describe some of the other types of machinery and equipment that is constructed by Kellogg & Company, besides the Cross cracking units?

A. For oil refineries?

Q. For oil refineries? Yes?

A. Pipe stills; vacuum stills; fractionating towers for treating plants.

Q. And then, besides that, there are other branches of steel business that they are engaged in? You are engaged in?

[fol. 323] A. Yes. We are engaged in doing power-house construction, sugar refineries, vapor mills, hydrocarbon plants.

Q. So that, comparatively, the Gray business was a mere incident?

A. The Gray business has been a very insignificant part of our work.

Mr. McKeever: Oh, well, now, if Your Honor please, that is a leading question and argumentative.

The Court: Yes. More or less so, I think. The jury understand it, I think.

Q. Mr. McKeever also asked you about the interest that the Kellogg Company had in royalties paid on Cross cracking units by licensees of the Cross cracking processes; and you stated that the Kellogg Company had some percentage interest in those royalties. Will you state to the jury how long that percentage interest continued?

A. That percentage interest continued only the first two years' operation of the particular plant.

Q. So that in the present case will you state how many years of the royalties involved here the Kellogg Company would have a claim on, under that arrangement?

A. The plant was started, as I recall it, in September, 1926. So that our interest in the royalties from this plant would be over on that same date in September, 1928.

Q. In the course of Mr. McKeever's question about the conference that you had or the conferences that you had in Enid with Mr. Champlin and Mr. Slater, he referred to the proposition or the proposal that had been made previously with reference to the Cross vapor phase treating system, and he prefaced his question by saying, "Did you know that such a proposition was made by Gasoline Products"? Did you intend in answering that question to state that the proposition or that you knew that the proposition was made by Gasoline Products?

A. I didn't mean that exactly. What I knew was this: I knew that Gasoline Products had agreed to advance the money to the Cross Development Company to build a vapor phase unit for the Champlin Company, and I knew that [fol. 324] that proposition had been made—a proposition had been made to the Champlin Company to that effect.

Q. Yes, I see. In connection with the Cross Engineering Company Mr. McKeever referred to the activities of that

company in connection with the Cross cracking units. Can you state whether of your own knowledge the Cross Engineering Company had other activities which did not concern Cross cracking units?

A. Yes, sir; I know that they did.

Q. Was the Kellogg Company interested in that other business?

A. No, sir.

Q. Just one other question I want to ask you. Mr. McKeever referred to the authority—inquired with reference to the authority that you had for Gasoline Products in connection with the drafting and preparation of contracts. Will you state whether you had any authority as far as you knew to vary the terms of the standard license agreement?

A. No, I had no such authority. I didn't say that I had. That I had authority from the Gasoline Products Company to negotiate with the customer and draw a draft of license and submit it back to Gasoline Products Company for their final approval.

Q. Any change by the Gasoline Products in the form which they gave you to use had to go back to the Gasoline Products Company?

A. Yes, sir; I had no authority to make any change without submitting it to them for their final approval.

Q. That was adopted in connection with the change that Mr. Champlin asked for in this license agreement here?

A. Yes, sir.

Q. Did Mr. Keith have any broader authority in that respect than you did?

A. No, sir.

Mr. Marsh: I think that is all.

Cross-examination resumed.

By Mr. McKeever:

X Q. I think that last question—I want to object to it, and also the answer. They did that so quickly I didn't get my—I was writing out the following witness.

[fol. 325] The Court: I didn't understand you.

Mr. McKeever: He is talking about Keith's authority. Of course he can—I think it may be testified——

The Court: You asked him about the same subject.

Mr. McKeever: He can testify about what authority he gave Keith, I think, but what somebody else gave him, that is what I had in mind.

The Court: What was the question and answer? (Read.) I don't know as he knows.

Mr. Marsh: The previous testimony elicited by Mr. McKeever was such authority Keith had on Cross cracking units came from the Kellogg Company.

The Court: He had no broader authority from that source.

Witness: Not in that respect.

X Q. That is as far as Kellogg & Company are concerned?

A. As far as Kellogg Company is concerned and as far as Cross cracking plants are concerned.

X Q. But you are not assuming to testify what authority Mr. Keith had assumed or was ratified by the Gasoline Products Company, are you?

A. Aside from Cross cracking plants?

X Q. Yes.

A. No, sir.

X Q. No. Well, did the Cross cracking plants sell in conjunction with a vapor phase Cross treater, aside from the Kellogg Company?

A. I am not attempting to testify as to what authority Mr. Keith had with respect to the Cross treater. I knew nothing about that. I think I am competent to testify as to his authority so far as the Cross cracking plant is concerned because——

X Q. That is through your company?

A. I don't think under the terms of our contract he could have gotten any authority in respect to that except through our company.

X Q. Have you got that contract?

A. No, I haven't.

X Q. Have your counsel or counsel here?

A. I don't know.

Mr. Hale: What contract do you mean?

[fol. 326] The Court: The contract whereby the Gasoline Products Company made the Kellogg Company their selling agent for the patent rights.

Mr. Marsh: One question will clear that up, by me.

Direct examination resumed.

By Mr. Marsh:

Q. The contract between the Kellogg Company and the Gasoline Products Company relating to this licensing business was made in 1924, was it not?

A. Yes, sir.

Q. And this contract that you refer to between the Kellogg Company and the Cross Engineering, relating to its employment, that connection was made in 1926, was it not, or 1925; in December, 1925?

A. I beg your pardon?

Q. In December, 1925, this contract?

A. I don't understand the question.

Q. I say the contract between the Kellogg Company and Cross Engineering Company under which Keith was acting was made in December, 1925?

A. Yes. Yes, sir.

Mr. Marsh: So the earlier contract couldn't possibly refer to the later contract.

Cross-examination resumed.

By Mr. McKeever:

X Q. You are giving us your percentage of income from the sale of the Gray process patents in 1927 and 1928. Is that income derived from the sale of that process by your corporation, or do you derive an income from the sale of it if other persons sell it?

A. We only derive an income from the sale of Gray plants used in connection with certain types of cracking units, whether they are sold by our company. May I explain?

X Q. Yes.

A. For instance, if a Gray plant is installed in connection with a Cross cracking plant, or if it is installed in connection with a Fleming cracking plant, and there are one or two others, I think, we would get our percentage of the royalty regardless of whether we made the installation or made the sale or some one else.

[fol. 327] X Q. In how many kinds of cracking plants are you interested so that you derive an income from that arrangement?

(Objected to as to form.)

Mr. Marsh: He infers there, Your Honor, that the Kellogg Company is interested in the other licensing companies and it is the same objection I had before. I don't object to the——

The Court: Can't you reframe that to avoid that objection?

Mr. McKeever: I am unable to see just what he means.

Mr. Marsh: You are predicating the question on an assumption that the Kellogg Company has some interest in the other cracking systems, in the other patents.

Mr. McKeever: No.

The Court: Read the question.

Read as follows: In how many kinds of cracking plants are you interested so that you derive an income from that arrangement?

Mr. McKeever: I am predicating it on his former answer that they got an—with it was put in in connection with Fleming, and he named some others. Now I want to know how many of them there were?

(Previous testimony read.)

Mr. Marsh: He doesn't say that he owns the plant. I don't mind asking him what companies were involved in that commission arrangement.

The Court: I don't think it is very important, anyway. Let him answer.

X Q. If I have misstated the question so it assumes he owns them, I didn't intend to do that. I just want to know how many plants you have that arrangment with, how many different kinds?

A. When the contract with Gray was made certain processes were excluded from the contract such as the Dubbs process and the Jenkins process being Gray's part—we might not be very successful in selling Cross towers in connection with those processes. My recollection is that the contract specifically covers Gray plants in connection with Cross, Fleming, Holmes-Manley and tube and tank processes, but I am stating that as my recollection. I am not absolutely certain I am correct.

[fol. 328] X Q. The same group controls all those patents, don't they?

A. Each company controls its own patents. I don't know what you mean by that question.

X Q. Well, I know each is a separate company, but aren't they interlocked as shown by your license agreement where you agree against interference?

A. They are cross-licensed, if that is what you mean. I don't think there is any interlocking ownership.

X Q. All right. Then in the Champlin plant your interest or your part of the royalty would cease at the end of the two years or September, 1928?

A. Yes, sir.

X Q. So you haven't received that money yet, have you?

A. I am unable to answer that question. I don't know. I don't keep track of our accounts.

X Q. Don't you know whether you have been paid or not, Harvison?

A. I don't know, really.

The Court: It seems to me we are getting quite a long distance from the issue, anyway.

X Q. Well, I am willing to admit I am trying to pin this witness down to his interest in this law-suit.

The Court: Well, go ahead and pin him. It takes quite a long while. I will say that.

Mr. McKeever: That is because he is so intelligent, as is suggested by the Court.

X Q. Do you get your money before the Gasoline Products Company get theirs, or at the same time?

A. We get our money after they get theirs. We get our money from them after they receive their pay.

X Q. But if they receive it then yours is due?

A. Yes, sir.

Mr. McKeever: If the Court please, I could answer the question myself now, but I shall not.

The Court: Yes, I presume so.

X Q. Now, when your royalty interest ceased, you still have some interest through your stock ownership?

A. Yes, sir.

X Q. That is continuous?

A. Naturally.

[fol. 329] X Q. Now you say the Gasoline Products Company were advancing the Cross Development Company some money to put this plant in at Champlin's, were they?

A. My understanding was that the Gasoline Products Company agreed to advance the money to build this unit that we are talking about, this Vapor Phase Unit.

X Q. Do you know how much they agreed to advance?

A. I don't know whether they agreed to advance the actual cost of the unit or whether they agreed to advance $25,000. I have a hazy recollection that the sum of $25,000 was mentioned at some time or other. My information on that, though, is hearsay.

X Q. You read the record on it, didn't you, the correspondence? Wasn't that called to your attention?

A. I will say I am not certain whether they agreed to advance the actual cost of the tower or whether they agreed to advance the $25,000. I might be able to refresh my memory if I were allowed to.

Mr. Marsh: I will put a witness on for that.

Mr. McKeever: Yes; I will not charge him with that.

X Q. The demand for the Vapor Phase treating system has been considerably reduced by the development of other processes of treating this unfinished gasoline, hasn't it, since the Champlain negotiations?

A. By other processes?

X Q. Yes, or other methods?

A. No, I don't think it has, Mr. McKeever.

X Q. Now I got that intimation from your last testimony.

A. No; I think I said that vapor phase treating processes were not satisfactory in connection with sulphurous oils, corrosive oils.

X Q. That depends on the product?

A. And that corrosive oils are being more and more used nowadays.

X Q. Mr. Harvison, are you an engineer?

A. No, sir.

X Q. You are no kind of an engineer?

A. I don't claim to be any kind of an engineer.

X Q. Did you have knowledge as a layman, so far as the engineering profession is concerned, as to whether or not there was any difference between the Gray towers and the [fol. 330] Cross towers except the adding of the copper to the clay?

A. I think my knowledge was what you might call a lay man's knowledge, yes.

X Q. That they were what, different or the same?

A. That they were the same except for the use of copper, either separately from the clay or as copperized clay, as it is termed. I knew of no other distinction.

Mr. McKeever: That is all, if Your Honor please.

Mr. Marsh: No more from me.

The Court: You want to arrange for Mr. Harvison to leave?

Mr. Marsh: Yes.

The Court: You will have to confer with Mr. McKeever.

Mr. McKeever: I can't think of any reason on our side why he should remain.

Mr. Marsh: Just a minute. Mr. Harvison will stay until to-night's train, and that will give you all the afternoon to think about it.

Mr. McKeever: If the Court please, with this reservation, and I am a believer in reservations: I want to notify them that there will be testimony that will contradict some of his, and they let him go at their own peril.

The Court: That is up to them.

Mr. Marsh: We will take the risk of that. Mr. Harvison will be available this afternoon. Mr. Welling will take the stand.

Mr. McKeever: Wait just a moment. We haven't rested our main case yet. We only stepped aside.

Mr. Marsh: I was hoping you would let me put Mr. Welling through his paces too.

Mr. McKeever: I will, I think.

The Court: That is by agreement.

Mr. Marsh: I think Mr. Welling would be willing to wait until to-morrow.

The Court: Would you rather he would step aside or testify?

Mr. McKeever: Let him testify if that is their convenience. I want just to accommodate them if I can. I see [fol. 331] that it makes no difference to us because we want to round out our testimony and it can be done afterwards.

The Court: You people are going to stay next week anyway, are you?

Mr. McKeever: Yes, sir, we will have to do that. Of course the excusing of Mr. Welling will be on the same grounds that we agreed to excuse Mr. Harvison, at their own peril, that, if we desire to contradict his testimony, we do not want to be foreclosed on that.

The Court: Yes.

Mr. Hale: How long will it take you to complete your case, Mr. McKeever, approximately?

Mr. McKeever: Well, I believe I can complete it by our adjournment time, this forenoon.

Mr. Hale: You may as well go ahead then.

Mr. McKeever: I beg your pardon. They have not cross-examined Mr. Leverton yet, have they?

The Court: Not yet.

Mr. McKeever: Of course, my agreement won't stand. I forgot about that. I meant the primary evidence I would put on.

Mr. Hale: That is what I understood.

Mr. McKeever: So we will now proceed in the regular order and let them examine Mr. Leverton on cross examination.

(Counsel on both sides confer.)

Mr. McKeever: We will finish with Mr. Leverton on our own evidence right now.

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G. E. Leverton, recalled, testified as follows:

Direct examination resumed.

By Mr. McKeever:

Mr. Jones: If Your Honor please, we have now five copies of Defendant's Exhibit No. 61, for the convenience of the jury.

The Court: Tabulations?

Mr. Jones. Yes.

The Court: You are going to use that now?

[fol. 332] Mr. Jones: We have finished with it. We just want the jury to have it for their convenience.

The Court: They should not take them away with them. Later on they may have them.

Mr. Jones: On cross examination.

Mr. McKeever: We merely have them available now.

The Court: Yes.

By Mr. McKeever:

Q. Now, Mr. Leverton, have you compiled any figures to determine the cost of the operation of what is commonly called here the chlorine plant?

Mr. Marsh: I understand that this line of questioning is still subject to our continuing objection.

The Court: Is this on the question of damages?

Mr. McKeever: On the question of damages, and I should announce that this now will be a separate element from what it has been heretofore, to keep them separated.

Mr. Marsh: We make the same objection, Your Honor.

The Court: Admitted.

Mr. Marsh: Exception.

(Exception noted for plaintiff.)

A. I have extended the computation over the estimated life of the plant, that is, I have extended the cost which Mr. Slater, the superintendent, testified as to the cost per barrel of treating gasoline.

Q. Speak a little louder and a little plainer now. There is a sort of confusion here.

A. I say I have extended the computation of cost per barrel of treating gasoline, which Mr. Slater prepared, and I believe testified to in his examination—I have extended it over the life of the plant.

Q. Now what basis do you take for the life of the plant, and why?

A. I estimated the life of the plant—I took the basis of the life of the plant at four years, based upon the depreciation rate which has been approved or allowed by the Income Tax Unit of the U. S. Treasury Department, which is 25% per year.

[fol. 333] Q. Allowed on the same equipment?

A. On the cracking plant, completed cracking plant, cracking and treating plant.

Q. Now give us that computation?

A. The cost per barrel of treating gasoline with chlorine treatment was one and forty-nine one-hundredths cents, or,

in fact, the figure is .014984. It is rather a long decimal. Treating 35,000 barrels per month for four years, amounts to $25,245.12. From which I have taken the arbitrary discount of 20%, and that discount—arbitrary, as I call it, discount—is based upon my experience in contact with the Income Tax Unit in handling discount for money to be subsequently received and for hazard and for unforeseen conditions.

Q. That is a standard discount recognized by the Income Tax Department?

A. That is a standard discount that is used by the Income Tax Department in moneys that are to be—applied to moneys that are to be received in the future, which I think must be arbitrary to allow for reducing of future income, present value, and for any unforeseen conditions.

Q. It has been adopted then by the Department as the standard?

A. Yes, I should say it is the standard.

Q. All right. Go ahead?

A. Which leaves or which results in a net value of $20,196.10 for the chlorine treatment over the four year life of the plant reduced by the discount and hazard.

Q. My attention was diverted a moment. Did you give the amount?

A. Yes; $20,196.10.

Q. I now go to another item, the item of interest. Have you made a computation of the interest on the investment of the cracking plant for the actual period of shut-down to get rid of the unfinished accumulated gasoline?

A. I have.

Q. Will you give us those computations and how you arrive at them and what standards you used?

A. The cracking plant was shut down on March 24, 1927, for the purpose of re-running the unfinished gasoline that had accumulated prior to the completion of the treating plants and that re-running was continued and the plant was not again operated until October the 8th, 1927, a period of eight and one-half months. The contract price of the crack-[fol. 334] ing plant, $413,000, would earn at six per cent interest during that eight and one-half months $17,552.50.

Q. Have you estimated the depreciation for the same period on the cracking plant?

A. I have.

Q. I did not mean estimated; I meant computed. Give us that?

A. Depreciation on the same $413,000, cost of the cracking plant, for the same eight and one-half months period, at the rate of twenty-five per cent per year, amounts to $73,134.36.

Q. How do you fix the depreciation?

A. The rate?

Q. Yes?

A. The rate is the rate that has been accepted by the income tax unit as the proper rate on our cracking plant for 1926.

Q. My attention has been called,—was there any other computations that we have overlooked? Is there an interest computation that we have not put in?

A. There was an interest computation put in yesterday.

Q. You have now put in all those that we computed?

A. Yes.

Mr. Marsh: Do I understand the only computation you have put in is "61", guaranteed yields and so on; and "62" the interest computation in tabulated form?

Mr. McKeever: Yes. The others were short, but he did not get time to make up as large a quantity, so I thought perhaps it would not be necessary to furnish those.

The Court: But I should think later on you had better put them in tabular form like those.

Cross-examination.

By Mr. Marsh:

X Q. You were speaking about the rate of depreciation on the chlorine plant. What rate of depreciation would be applicable to the treating towers that you put in at the plant in the Fall of 1926?

A. The Income Tax Unit required a composite rate on the entire cracking plant which included—that is, what we termed on our books as cracking plant, which included the [fol. 325] Cross plant, the treating plant, and everything that was included in that one group.

X Q. And that was all at the rate of 25 per cent per year?

A. Yes, sir.

X Q. In making this last computation of interest you stated that the Cross cracking plant was shut down from March 24, 1927, to October 8, 1927, and I think you said that that period was eight and one-half months. It is actually six and one-half months, is it not?

A. That is correct. There are two months too much interest in there.

X Q. Will you please state what correction should be made on that account?

A. The interest is $8,604.16 per month, or a correction for two months amounting to $17,208.32, leaving a net interest of $55,926.04.

Q. Will you state the amount of the Cross cracked gasoline that was re-run through the Cross cracking plants during this period that you have just referred to from March 24 to October 8, 1927? I show you the record of the previous trial, pages 196 and 197, and ask you if you will read them to the reporter, the answers which you made. I will ask you by months. For the month of April, 1927, how many gallons of that unfinished gasoline were re-run through the Cross plant?

A. 1,219,592 gallons.

X Q. And for May, 1927?

A. 1,566,054 gallons.

X Q. For June?

A. 1,173,580 gallons.

X Q. For July?

A. 1,316,233 gallons.

X Q. For August?

A. 726,927 gallons.

X Q. For September?

A. 52,461 gallons.

X Q. Can you state, Mr. Leverton, in connection with this matter of damages, and if so will you state, the stock of straight-run gasoline in storage at the plant of Champlin Refining Company on September 16, 1926?

Mr. McKeever: We object to that for the reason that it is immaterial.

Mr. Marsh: We think it is extremely material to show what their policy was with the straight run gasoline during [fol. 336] this period that they assert that they were forced

to store the cracked gasoline on account of the lack of treating tower.

The Court: I will admit it for what it is worth.

A. The inventory of straight run gasoline September 16th was 2,898,566 gallons.

X Q. Refreshing your recollection from that table that you have in the book there will you state the amount of straight run gasoline on storage on the first of each month following September 16th? First give me October 1st, 1926?

A. October first was 3,792,355 gallons.

X Q. November first?

A. 2,715,089 gallons. December first, 4,084,573 gallons. No; that is 4,073,937 gallons.

X Q. January first, 1927?

A. 4,327,881 gallons, January first, 1927.

X Q. February first, 1927?

A. 6,115,148 gallons.

X Q. March first?

A. 6,244,231 gallons.

X Q. April first?

A. 6,746,376 gallons.

Q. Now will you subtract the amount of straight run gasoline in storage on September 16th from the amount of straight run gasoline in storage on April 1st, and advise the jury as to how much straight run gasoline you accumulated during that period?

A. The stock of straight run gasoline increased during that period from September 16, 1926, to February 1, 1927, 3,847,810 gallons.

Q. Now, Mr. Leverton, have you got a copy of your Exhibit 61 before you?

A. Yes, sir.

Q. I want to ask you some questions on that.

Mr. Jones: May I hand that now to the jury?

The Court: Yes. You had better, now.

(Mr. Jones hands copies of Defendant's Exhibit 61 to the jury.)

The Court: You had better give one to every two men, if you can.

Mr. Jones: Yes, Your Honor. I thought they could divide them up. I have given the foreman one.

[fol. 337] Q. Now, Mr. Leverton, if you will refer to the second item on Defendant's Exhibit 61, it states, as I understand it, the number of gallons of gasoline which would be theoretically produced under the assumption on which this table was based from September 20, 1926, to the time these treating stills—treating towers—were completed in February, 1927. Is that right?

A. Yes.

Q. And will you state the total number of gallons of gasoline that appears on that statement?

A. 7,125,300 gallons.

Q. That is approximately the same amount of cracked gasoline that you had in storage on April 1st, of straight-run gasoline, isn't it?

A. About 400,000 gallons more; a little less than four hundred thousand.

Q. In describing this basis on which you made up this total you testified yesterday to the items which entered into—or the detailed expenses—which entered into this item which you called direct expense per month, did you not?

A. Yes, sir.

Q. I will read your answer here: "The first item I have is direct expenses per month—Q. What do you mean by that? A. (Continuing)—which is the expenses supplied to me by the superintendent of the refinery, which consist of labor, fuel, electricity, steam, water, gasoline, fuel, amounting to $6,495.44 per month." That is your answer. Have you made any allowances in this statement of cost for overhead expenses of any kind?

A. No, sir.

Q. Have you made any allowances for sales expenses?

A. No, sir.

Q. Insurance?

A. No, sir.

Q. Superintendence?

A. No, sir.

Q. Depreciation?

A. That is, you mean by superintendence, outside of the direct labor on the plant?

Q. Yes?

A. No, sir.

Q. Depreciation?

A. No, sir.

Q. Clerical and office expenses?

A. No, sir.

Q. Advertising expenses?

A. No, sir.

[fol. 338] Q. Can you state whether in your bookkeeping of the Champlin Refinery Company you estimate at the end of the year or at any time the cost per barrel of output of gasoline, of your operations? Did you work out any such figures as that?

A. Well, I don't think—it is allocated in a way. But to compute accurately the cost of a barrel or a gallon of gasoline, where we are making more than one product, becomes quite theoretical.

Q. It is entirely theoretical, of course, but I wondered if you had made any attempt to arrive at any such theoretical figure as that?

A. Yes, sir.

Q. Can you state, approximately, what that computation shows as to the cost per barrel of finished gasoline?

A. No. I couldn't.

Q. Well, would it be as much as a dollar a barrel? The entire cost. I mean, including the depreciation and overhead and all other indirect charges?

A. I think probably I answered you wrong. I didn't understand your question; I do now. The expenses—that is, those such as labor and those that have been named—I have never allocated those to a particular product.

Q. You never made any effort to pro-rate them in some bookkeeping method which would charge each gallon of fuel oil with the pro-rata share of the overhead expenses?

A. No, sir.

Q. Have you figures here from which you could state what the total of the overhead expenses of the Champlin Refining Company is for 1928, we will say?

A. Well, what would be included in the overhead? I could only make a guess, anyway.

Q. Sales, insurance, taxes, superintendence, clerical and office expenses, and advertising?

A. The sales expense is a part of a combination department in our company—sales and traffic—which department operates our tank trucks—tank cars—and does our selling. And it also includes the advertising. But the net result

of that department isn't an expense. It is a very nice earning.

Q. That is, due to the profit on the tank car operation?

A. It is due to the earnings of the tank cars in transporting the products which we sell.

[fol. 339] Q. Isn't it a fact, Mr. Leverton, that in any proper method—or in any proper accounting system, the overhead expense is a charge against your production, and in arriving at the net income of your business you have got to take care of your overhead expense as well as your direct expense?

A. Oh, the overhead expense must be deducted to arrive at the net profit of the business. Yes.

Q. You are unable to tell us what that overhead expense would be, applied to a barrel of this gasoline that this table represents?

A. No.

Q. And this table makes no allowance for overhead expense at all?

A. No, sir.

Q. Now in the table you have an allowance of $848.25—down in this list of expense—which you charge to the clay for towers at $5.00 per 1,000 gallons of gasoline. Is that the only expense there would be incidental to treating gasoline with the towers which you have now?

A. There would be labor. I think that includes an estimate of labor, however.

Q. Is that included in the first item? Labor?

A. I think it is included in both items on this schedule. Both in the refinery superintendence computation and in the $5.00 per barrel.

Q. Have you included any allowance for making that gasoline sweet to the doctor?

A. That is what that chlorine treatment does.

Q. Have you included any expense for the chlorine treatment, in this table?

A. That is in the direct charge of $6,495.44, I think.

Q. In your direct testimony you didn't enumerate any treating expense. Will you please look at your figures and say whether you are right on that?

A. The schedule of expense which the superintendent supplied me—the last item on the schedule—treating gasoline at point 014984 per barrel $525.94, which is included in the $6,495.44 per month.

Q. You simply omitted to mention it in enumerating these items yesterday?

A. Possibly so.

[fol. 340] Q. Is there anything else in there that you omitted to enumerate?

A. Not that I remember of.

Q. Mr. Leverton, you take the figure of depreciation that you have testified to before as to the total Cross cracking plant, including this treating plant, as I understand it: Will you state what that depreciation would be for the part covered by this tabulation Defendant's Exhibit No. 61?

A. Four—The original computation that I testified to; $413,000?

Q. Yes. That is based on the $413,000?

A. Yes. On the contract alone.

Q. That is, without the treater?

A. May I make a statement with reference to an answer I gave you a while ago. I gave you the correction of interest—that is, I was answering your question, and I gave you the figures correcting the depreciation computation for that period.

Q. You weren't giving—You were giving me the depreciation from March, 1927, to October, 1927?

A. Yes. I corrected the depreciation. I didn't correct the interest, for this six and a half instead of eight and a half months.

Q. What was the correct amount?

A. The corrected depreciation is that amount I just testified to a little while ago, $55,926.04; and the corrected interest is $13,422.50, and that——

Mr. Marsh: Thank you very much.

Mr. McKeever: Let him finish.

A. Well, I think I had finished.

Q. Now, we are talking about a different period now, you know. From December, 1926, to February, 1927,—that is approximate. That being the period covered by Defendant's Exhibit 61? If it would be easier, Mr. Leverton, I would suggest that you let us have this answer after lunch?

A. I can give it to you in a minute.

The Court: What did he say?

Mr. Marsh: I think possibly he could make this computation and give it to us after lunch.

The Court: Very well.

[fol. 341] X Q. Also, Mr. Leverton, will you make a computation—he is going ahead.

The Court: He is going to give you another figure to look up during the noon hour.

A. I can answer that one.

X Q. Can you?

The Court: Go ahead.

A. The depreciation at 25% per year for the period of September 20th to the completion of the treating tower at February covering the same period of time would be $41,586.77.

X Q. And can you state approximately—not the exact figures—what the depreciation during that same period would be on the treating towers that you have installed there? That is just over a third of a year. Never mind about that. The treaters were not in use at that time. Now, Mr. Leverton, during the lunch hour, will you please prepare and let me have a statement showing for the year 1927—I believe that is the year to which most of this table relates—and in 1926, if you have it, the items of overhead which I have enumerated in the question that I asked you, the sales expense, insurance, taxes, superintendence, depreciation, clerical and office expense, advertising, patent expense and litigation, if you have a separate head of that kind.

A. We don't know——

Mr. McKeever: He hasn't had any of that yet.

X Q. In computing the overhead expense, will you eliminate any profits of the company in like this tank line so that we will have simply the items of gross expense?

A. I meant—pardon me.

X Q. Go ahead.

A. Do you want that computed as applicable only to the cracking plants or applicable——

X Q. No, sir; I would like——

A. To the skimming plant, or——

X Q. What I would like you to give would be the totals for the year and then apportion those to this—as between [fol. 342] this cracking plant and the balance of the prop-

erty of the company, if you can, if there is any way in which you can do so.

A. I couldn't do that, Mr. Marsh, if I had the entire records of the company.

X Q. You can state approximately what the investment is in this and in the balance of the properties and if you base it on the income—I don't care what way you do it, but I want some sort of an apportionment to show a proper charge for overhead against this cracking plant that is referred to in this Defendant's Exhibit 61, and then I want to apply that to this period that the table covers. I don't ask for exact figures, but for such an estimate as you are able to prepare with the data that you have there.

(Suspended until afternoon at two o'clock.)

Afternoon Session (Friday Afternoon, April 26, 1929)

Mr. Marsh: It has been agreed that the tabulations that were requested of Mr. Leverton to make will be deferred until tomorrow so as to give him more time.

Cross-examination of Mr. Leverton resumed.

By Mr. Marsh:

X Q. Mr. Leverton, I show you copy of the oil price handbook for 1926 that has been referred to on a number of occasions and ask you to state whether the classification of Oklahoma gasoline indicates in addition to the gravity the end point of the gasoline? Will you please examine that?

A. Yes, the handbook indicates both the gravity and end point.

X Q. So that in order to correctly apply the hand-book prices to any particular gasoline, you have to know the end point as well as the gravity, do you not?

A. Yes, I think the two.

X Q. Now, the column here entitled 56-58 U. S. motor 437 end point, that is the recognized type of gasoline, is it not?

A. Yes, sir.

X Q. Can you state to your knowledge whether that type of gasoline has to meet other specifications besides gravity [fol. 343] and end point in order to come within the definition of U. S. gasoline?

A. I think the term U. S. motor implies the——

X Q. Does it imply——

A. Certain tests.

X Q. Does it imply certain intermediate boiling point like those——

A. I think that is the requirement of the U. S. motor term.

X Q. Does it imply a certain minimum sulphur content?

A. I couldn't tell you whether sulphur is in that or not. It probably is.

X Q. I will have Mr. Slater—I presume he would know.

A. Yes, I think he would know.

X Q. And in the column entitled 58-60 U. S. Motor 437 end point, the same would be true, would it not, 58-60, U. S. motor 437 end point?

A. I think that that designates all of the distinction between the two gasolines, the 56-58 and the 58-60.

X Q. There are other specifications in addition to the gravity and end point?

A. I think that is right.

X Q. To make it come within U. S. motor?

A. That is my idea.

X Q. The prices you have used in preparing this Exhibit 61 appear to be taken from the column entitled 58-60 U. S. motor 437 end point; is that correct?

A. Yes, sir.

X Q. Now, do you know as matter of fact whether you are now manufacturing gasoline of that type with your Cross cracking unit?

Mr. McKeever: We object to that for the reason what they manufacture now isn't in the case.

Mr. Marsh: I think it is wholly material. Here is a tabulation which they base on a hand-book and the price includes in properly describing the gasoline, as Mr. Leverton has said, not only the gravity and the end point, but certain additional specifications. Now, I am asking this question to show the fact as to whether or not the gasoline that this table is intended to refer to meets those other specifications as well as——

[fol. 344] The Court: I think on cross examination you are entitled to inquire.

Mr. McKeever: Now, if the Court please, we are not unmindful of this difference between our presentation of

the matter coming up. It is a matter of long consideration, and of course we knew it to be involved. Therefore, before the Court rules I want to make the objection to it on the ground that the evidence now shows that the computation made by the witness covers what we have termed in this case the shut-down period and based on the method of calculation furnished us by the agent of the—the selling agent, Mr. Harcourt, and on the same method of calculation which is reflected in the guaranty of performance which is in the evidence, being the contract signed with the plaintiff Gasoline Products Company, and that the subsequent experience is immaterial for the reason that the making of a certain kind of a product may be a policy of the company at one time or different at another, and to manufacture a different product for some other reason would not be applicable here.

Mr. Marsh: Your Honor please, the guaranty to which my brother has referred has no reference at all to finished gasoline. It refers to unfinished gasoline, as to quantity.

The Court: Let's have the question read again.

(Question read as follows.) Now, do you know as matter of fact whether you are not manufacturing gasoline of that type with your Cross cracking unit?

The Court: By that type you mean of this——

Mr. Marsh: Of the type that conforms to the tabulation which they have used as a basis for their calculation.

X Q. I will ask the question as to whether during these months in question they made gasoline of that type?

The Court: That is altogether different.

X Q. I will ask you. Can you answer that?

A. State that, will you, please?

X Q. Will you state whether during the months from September, 1926, to February, 1927, your Cross cracking [fol. 345] plant were manufacturing gasoline of the type described in column entitled 58-60 U. S. motor 437 end point?

A. No, sir; it did not.

Mr. Glasser: I would like to make one further objection.

The Court: Objection to that question?

Mr. Glasser: Yes.

The Court: Your other counsel said he had no objection.

Mr. Glasser: I would like to make the objection on the technical ground. That question presupposes a highly technical knowledge of engineering, and I doubt if the witness is qualified or has qualified to answer that.

The Court: Ask him. If he is not qualified I presume he would say so.

Mr. Marsh: He has just said he knew that this table represented other specifications.

The Court: Do you feel qualified to answer that question?

A. I think that I know enough about what the U. S. motor is to say that we couldn't manufacture U. S. gasoline with the plant that we had at that time.

X Q. In this tabulation, the Defendant's Exhibit 61, have you included any item of expense for blending of the Cross cracked gasoline?

Mr. McKeever: I object, for the reason that is immaterial.

The Court: I don't know whether it is or not. It has no bearing——

(Question read.)

They may take a different view on that than they did. I think you have a right of cross examination to ask him whether he knew that feature or not.

Mr. Linnell: He is not inquiring about the application of the U. S. motor gasoline hand-book price to the product which we have set out in this tabulation. Now it seems to me that if he is going to go into the proposition of what we would have done during that period when we had the plant which was not making finished gasoline and when we were not putting any gasoline on the market, that it is a pretty vague sort of question and rather implies a man's determination when he does not manage the plant as to what we would have done with unfinished gasoline.

[fol. 346] The Court: Your witness has given an elaborate calculation based on a great many different elements and features, and I think he can be inquired whether he has included this, that or the other which they may think has a bearing on it. If it does not, it will develop later.

Mr. Linnell: That is perfectly all right, if that is the only foundation for that question. We think it opens the door,

and if they use it we have a right to show the prices we got for that kind of a product later.

The Court: Very well. This is cross examination, remember.

X Q. Your answer was——

A. I have not.

X Q. That includes no——

A. I have no provision for blending.

X Q. I will call your attention, Mr. Leverton, to the figures appearing on this calculation, Defendant's Exhibit 61, under gas oil. You refer there to hand-book price?

A. Yes, sir.

X Q. Will you read to the jury the monthly hand-book price for gas oil for the months involved in this calculation after September, 1926?

A. In gallons?

X Q. No, just the price.

A. Per gallon?

X Q. The price per gallon, yes.

A. That is 4.313 of one cent.

X Q. And what was October, 1926?

A. The same.

X Q. And for November, 1926?

A. 4.312 of one cent.

X Q. And for December, 1926?

A. Four and 484 thousandths of a cent.

The Court: That is four cents?

Mr. Marsh: And a fraction. He is speaking of cents per gallon I think.

The Court: You multiply your gallons by 4.312.

A. Your decimal point would be two plus over. Two plus, without revising.

X Q. In the next line the corresponding prices per barrel are given, are they not?

A. Yes, sir.

[fol. 347] X Q. I will use the barrel price because I see the quantity is in barrels. I will ask you to state the increase in price indicated by this tabulation between September, 1926, and December, 1926, in the hand-book price of gas oil?

A. Per barrel or per gallon?

X Q. Per barrel, yes.

The Court: Those figures on barrels must be dollars.

The Witness: That is dollars, yes, sir.

The Court: Don't you see that one who didn't understand would think they were both either cents or dollars?

The Witness: That is right from the way that is pointed off, yes, sir.

A. The increase in price from September to December was seven and one hundred and eighty-two one-thousandths of a cent per barrel.

X Q. Now I will ask you — state what that increase of price would be applied to the total amount of gas oil, 261,000 barrels, which is stated on this tabulation?

A. $18,745.42.

X Q. Now, if the company had purchased this quantity of gas oil in September at the time when this September price was applicable, and had sold the same amount of gas oil in December, when this December price was applicable, that eighteen-thousand-dollar figure would have represented a profit, would it not?

A. If they had bought 261,000 barrels in September and had sold in December, the profit would have been $18,745.42.

X Q. And the same would have been true, would it not, of any gas oil purchased at the September price and sold at the December price? I mean there would have been that profit per barrel, not eighteen thousand, but the profit you have stated of seven cents?

A. In coming within that price, yes.

X Q. Seven cents a barrel profit?

A. Yes, sir.

X Q. I want to ask you this, Mr. Leverton, whether in 1926 the Champlin Refining Company sold its straight run gasoline under a trade name?

A. Under the name of "Champlin."

X Q. Was there any such trade name used as "Premium Straight-run" in the advertising?

A. I don't know whether that word "premium" ap- [fol. 348] peared in the advertising or not. I wasn't that familiar with the advertising. It might have been and might not.

X Q. Have you ever heard the phrase in connection with your sales?

A. Oh, I have heard the name, the term, "premium," applied to all Champlin products by a number of us, I would say.

X Q. Can you state whether your sales of straight run gasoline in 1926 were made at more or less than the hand-book price in bulk sales?

A. They were made at a higher price.

X Q. That would be a premium in the sense in which this word is used?

A. Well, I don't know; possibly.

X Q. Isn't that the significance of the word in the phase "premium straight run," that it was better gasoline?

A. If you refer to the term—the question you asked me a while ago, have I ever heard that term used in connection with Champlin gasoline—I don't think that is the intent, to imply by the word that a greater price is chargeable.

X Q. What do you think that refers to, to the quality?

A. I think that refers more to the particular quality, yes, sir.

X Q. Can you state whether the price at which your straight run gasoline was sold in 1927 in bulk sales was more or less than the hand-book price?

A. It was more.

Mr. Marsh: I think that is all, Your Honor. I understand that Mr. Leverton will furnish us those other figures later.

The Court: Yes, I understand so.

Redirect examination.

By Mr. McKeever:

Q. Mr. Leverton, I will ask you if the same rule didn't apply in 1927 to the cracked gasoline, the Champlin cracked?

A. There wasn't a hand-book price I don't think, Mr. McKeever, on Champlin cracked gasoline. I don't know; I wouldn't want to say the price was comparatively even with U. S. Motor without looking.

Q. Didn't Champlin cracked product bring a higher price on the market than the others? Didn't you maintain a

[fol. 349] higher scale of prices for your cracked gasoline than the general price in the Mid-Continent Field?

A. I don't know.

Q. In making your calculations you have said that you took into consideration the Harcourt calculations in the guarantee. In the Harcourt calculations was the standard used the Hand-book standard?

A. That was what I found it to be, yes, the U. S. Motor Gasoline.

Q. And so you used the same?

A. Yes, sir.

Q. Have you made a sort of a graph of the fluctuation in the straight run?

A. Yes, sir; that is the accumulation of the straight run gasoline in stocks (handing document to counsel).

Mr. McKeever: I now hand an instrument to the Reporter and ask that the same be marked Defendant's Exhibit No. 63.

(Document marked "Defendant's Exhibit No. 63.")

I now submit it to counsel for examination and offer it in evidence. Wait, Mr. Marsh. Let me have it explained a little before I do that.

Q. Now, Mr. Leverton, handing you the Defendant's No. 63, what do you call that?

A. That is a graph, showing the stock or inventory of finished straight run gasoline on hand at the end of each month in Champlin Refining Company tanks or belonging to Champlin Refining Company during the years beginning January 1, 1925, and ending March 31, 1929.

Mr. McKeever: We now offer in evidence Exhibit 63.

(Witness explains same to Mr. Marsh and Mr. Hale outside the hearing of the jury.)

Mr. Marsh: No objection at all.

(Defendant's Exhibit No. 63 admitted.)

By Mr. McKeever:

Q. That is straight run?

A. Yes.

Q. Now, Mr. Leverton, would you be so kind as to come

and show that to the jury by holding it up and explaining to them what that means? You may come out here in front of the jury.

A. (Explaining to jury.) This chart is the ordinary chart, that is, following the ordinary form, showing the fluctuation of stock, the heavy black line indicating the stocks or inventory of finished straight run gasoline. By [fol. 350] the term "finished" I mean gasoline ready for the market, at the end of each month. Months are indicated at the top, and the line to the left of the heading indicates the point at which it reached on the chart; for instance, this high point (indicating) is March.

Q. How much does it show in March?

A. That happens to be in March, 1925, and the inventory was 6,634,000 gallons. The last three cyphers are left off in all the figures at the bottom, in fact it is over to the side too. It is in thousands of gallons. And the light line indicates the sales in gallons for the corresponding months, and the sales are also at the bottom in figures.

Q. Now, Mr. Leverton, pick out some of the months and compare for the jury—the comparison of the amount on hand and the sales?

A. Well, take, for instance, here in October, 1926, the chart indicating here the amount of stocks on hand at the end of the month was 2,715,000 gallons and the sales for that month, the month's sales, is 6,550,000 gallons. Taking the month a little bit opposite here, July, 1927, the sales equal 10,048,000 gallons. The line coming clear out to the top of the chart. While the inventory was 3,009,000 gallons, the chart coming way down in the lower part, the line indicating the stocks. Sales above, and heavy line below indicating the stocks.

Q. Now, Mr. Leverton, does the season of the year have anything to do with those fluctuations?

A. Yes, sir.

Q. Why?

A. I suppose the season of the year would have something to do with it. The stock of straight run gasoline increases during the winter or colder months, and reaches the low point for the year during the mid-summer.

Q. Why is that?

A. The demand for straight run gasoline is greater in the summer time, and it is customary—well, necessary to

accumulate a stock of straight run gasoline in the winter time in order to supply the demand that comes in the summer.

Q. How many of those copies have you?

A. I have three copies.

[fol. 351] Mr. McKeever: Then I desire to leave an extra copy with the Clerk when we finally finish, and I will furnish Mr. Marsh a copy.

Q. Now, as I understood you a moment ago, Mr. Marsh asked you if the Champlin Refining plant during what we have termed the "shut-down period" could manufacture a gasoline of the U. S. motor specifications, and I thought you said "no"?

A. The question as I understood it was, did we manufacture a U. S. motor gasoline from the cracking plant.

Q. You could and did, and had the equipment and did manufacture during that period gasoline of the U. S. motor specifications from your straight run?

A. Yes, sir.

Q. The plant then during that period, was not equipped to crack gasoline of that specification in cracked gasoline?

A. No, sir; it wasn't.

Mr. McKeever: I now hand the Reporter an instrument which I desire to have marked "Defendant's Exhibit 64."

(Paper marked "Defendant's Exhibit 64.")

Q. Mr. Leverton, handing you "Defendant's Exhibit 64," will you explain to the jury and the Court what this is?

The Court: What is that intended to be?

A. That is a graph or chart of the prices of U. S. motor or equivalent specification gasoline, showing the hand-book price under the head "Oklahoma Refiners and the Champlin spot price," and the Champlin actual average sales for each month.

By Mr. McKeever:

Q. During what period?

A. During the period from January first, 1925, to March 31, 1929.

Mr. Marsh: Your Honor, I do not see that this exhibit has any bearing on the question that is now before the Jury

unless he identifies this chart with the type of gasoline to which it relates. It is not labeled in any way indicating what kind of gasoline it is. We are talking about two different commodities according to their view of the thing.

Mr. McKeever: Answering Mr. Marsh, we prepared ourselves on the very question he asked involving this straight [fol. 352] run gasoline, and he not only asked quantities but prices, and for that reason we now offer in evidence that chart.

Mr. Linnell: Merely corroborative to the answers given Mr. Marsh on his examination.

The Court: Admitted.

Mr. McKeever: We will advise Mr. Marsh it relates to Champlin straight run gasoline.

Q. That is right, Mr. Leverton?

A. Yes, sir.

Q. Will you please take this Exhibit No. 64 and explain that to the jury as you did the Exhibit 63?

A. This chart is similar to the other chart that I just showed you; covers the same period; but where the other chart had two lines on it indicating fluctuation, this one carries three; and this is chart showing the prices per gallon for gasoline, in tank car lots, I should say, showing the spot market, which is the price for immediate sale of the Oklahoma refiners, which corresponds to the hand-book price, and, in comparison with that, Champlin's spot market price of the same specification straight run gasoline; and then the average price which Champlin received for every gallon of that grade gasoline sold during each month.

Q. In connection with your explanation tell them what the Champlin spot price means?

A. Well, the spot price, whether Champlin or Oklahoma refiners', the term "spot"—I don't know the history or origin of it, but it is used—means for immediate shipment or immediate acceptance. It is an offer to sell to-day and not a contract price or over a long period price. The term "spot" is used with reference to the two charts; that is, the selling price day by day of the Champlin Company and the average of the Oklahoma refiners.

Q. I will ask you to give the jury some examples from your chart, fixing a specific time, showing the difference in

the relative value, I should say the actual price; shows the straight run gasoline as shown by that graph?

A. September, 1926, which is the month, I think, that Mr. Marsh asked me about, the chart is drawn across indicating the relative value, I should say the actual price; shows the [fol. 353] Champlin spot price of eleven and forty-five hundredths cents per gallon, and Oklahoma refiners' spot market price of ten and seventy-eight hundredths cents per gallon. Champlin sales actually averaged over the month eleven and thirty-seven hundredths cents per gallon. The actual figures appear at the bottom of the chart.

Q. And what was the difference in the average over the month between the Champlin price and the refiners' price for that month?

A. The Champlin spot price exceeded the Oklahoma refiners' spot market by sixty-seven hundredths of a cent per gallon; and the Champlin sales,—actual sales,—exceeded the Oklahoma refiners' spot market by fifty-nine hundredths of a cent per gallon.

Q. That is the average?

A. Yes.

Q. Through the month?

A. The average of all the sales through the entire month.

Q. Now, Mr. Leverton, further explaining, tell the jury how you get that average. You used this as an average price through the month. Explain to the jury how you arrived at the average price.

A. The Oklahoma refiners' average prices are taken from figures compiled by the National Petroleum News who publish this hand-book that has been introduced in evidence; and the Champlin spot price was arrived at by the weighted average method which I think I explained yesterday, of taking into consideration the price and the time for which it was offered and averaging it over the month. The Champlin actual sales price was arrived at by dividing the total number of gallons sold into the total amount received for such amount sold during each of the months.

Q. And the chart is based, as I understand you, on actual experience, so far as the Champlin prices are concerned?

A. So far as the Champlin price is concerned. Yes.

Q. And the prices of the refiners, as you term it, is taken from the hand-book?

A. Well, I didn't have the hand-books covering all of those years, but I procured the figures from the publishers of the hand-books.

[fol. 354] Mr. McKeever: I see. I think we are about through with this witness.

Q. Mr. Leverton, my attention has been called to your testimony on a former trial of this case with reference to the including by the compilers of the hand-book over certain periods—or, rather, not including, the Champlin prices. Was this true as to any of the periods that you have testified concerning?

A. I am sure that that was true during part of the period covered by this chart. But I wouldn't say the exact date at which they began to include Champlin quotations in the hand-book prices.

Q. It would be the fore part of the period that they were not included?

A. Yes. My recollection of it would be that they started including our prices somewhere in 1927. But, of course, I may be wrong on that.

Q. Well, can you state, as a matter of fact, that commencing in 1926, they were not included? That far back?

A. Yes. I believe I am safe in saying that they were not included in 1926.

Q. Why were they not?

A. Well, the contracts—or, rather, I should say it this way, I think—. Some of the refiners made a practice of pricing or making the contract with certain jobbers for gasoline over a period based on hand-book prices; and our prices for a certain grade of gasoline, such as the U. S. Motor, was higher than the other refiners' in that territory; and the jobbers didn't seem to feel that our prices should be included, and it was some time before the publishers of the hand-book became convinced that our prices should be included, because we were considered, as it seemed, isolated, in so far as our prices were concerned, with reference to the other refiners.

Q. During that period were you actually selling your gasoline—say the U. S. Motor specification—at a higher price?

A. Yes.

Recross-examination.

By Mr. Marsh:

X Q. I just have one question. On the chart, Defendant's Exhibit 64, which you have explained to the jury, showing the price of straight run gasoline,—this chart contains no [fol. 355] figures relating to the sales of cracked gasoline by the Champlin Refining Company during this period?

A. No, sir.

X Q. And this tabulation, Exhibit 61, uses the hand-book prices for U. S. Motor gasoline, does it not?

A. Yes, sir.

X Q. Which is, again, a different gasoline from the gasoline which you made in 1926 or 1927 from the cracking units?

A. We didn't finish the gasoline during the period that that chart covers from the cracking plant at all.

X Q. Yes. But when you finished that same gasoline, was it, even then, U. S. Motor gasoline?

Mr. McKeever: Oh, I object, because it is immaterial. The evidence shows that the Champlin Refining Company didn't finish any cracked gasoline within the period specified.

The Court: I know it. But I think he has a right to this information he asks.

Mr. McKeever: Very well. And Your Honor will reserve us an exception on that point?

The Court: Yes.

(Exception allowed and noted.)

A. I am not sure just what the specification of the gasoline during 1927—of the cracked gasoline during 1927—was. That is,——

X Q. Well, if you don't know, don't testify, Mr. Slater.

Mr. McKeever: Leverton.

Mr. Marsh: Pardon me, yes. Mr. Leverton. That is all.

Mr. McKeever: Pardon me, Your Honor, before Mr. Leverton is excused, I made a memorandum to ask him about those expenses, and then forgot it.

Redirect examination.

By Mr. McKeever:

Q. Now, Mr. Leverton, before the lunch hour Mr. Marsh was asking you about certain expenses which you hadn't included, and I will ask you now to explain why those weren't in your calculations?

A. The exhibit which I prepared—I am not sure about the number—the computing of profits by months——

[fol. 356] The Court: Number 61.

A. Number 61. —was computed to show a profit, or a revenue I should say—a gross profit—which is the difference between the sale price—the selling price—and the cost of the gas oil; that would or could have been produced by running the cracking plant and deducting from that revenue only the additional expenses that would have been necessary to run the cracking plant that weren't incurred when the cracking plant shut down.

Q. That is, that were not incurred by the refinery generally?

A. Yes. I might explain that; because—well, taxes go on whether you run the plant or not; and depreciation goes on whether you run the plant or not, and overhead goes on whether you run the plant or not. Such items as that I have not included, because they were incurred in any event and this is only to cover the additional expenses that we would have been put to to produce an additional revenue.

Q. And to make this finished product in accordance with the contract and guarantee?

A. Yes.

Q. Now the items you have referred to—it has been called to my attention—as going on anyway, whether you had the treater or not, were the items that Mr. Marsh mentioned this morning?

A. Yes. Those were the ones that I had in mind, and left out at the time I made the computation purposely, because of that reason.

Mr. McKeever: That is all.

The Court: Any further questions of this witness?

Mr. Marsh: No, sir.

(Witness excused.)

Mr. McKeever: We are just about to close our case, Judge. I want to call Mr. Slater to ask him one question I am afraid I have overlooked in examining him yesterday. Well, not one question, but it concerns one item.

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[fol. 357] Mr. E. J. Slater, recalled by Defense, testified as follows:

Redirect examination.

By Mr. McKeever:

Q. Mr. Slater, will you give the jury the cost of the construction of what we have termed here as the chlorine plant?

A. The cost of the chlorine plant—of the chlorine treating plant—in itself is $4,400.00. And then it was necessary to have a 2000 barrel tank in connection with it. The tank cost $1,800.00, and the erection of the tank $600.00.

Mr. McKeever: That's all.

Cross-examination resumed.

By Mr. Marsh:

X Q. Mr. Slater, Mr. Leverton testified as to the fact that during the period from April, 1927, sometime in April, 1927, to September, 1927, a large amount of the unfinished gasoline produced in the Cross cracking plant was re-run through the Cross cracking plant pipe still?

A. Yes, sir.

X Q. Will you state whether both of the cracking units were used for this purpose?

A. No, just the one.

X Q. Just the one?

A. Yes.

X Q. Was that one unit used continuously?

A. Yes.

X Q. That is, with such shut-downs as were necessary?

A. It wasn't necessary for any shut-downs in that case.

X Q. Now taking the kind of gasoline that you were making or could make with your Cross cracking plant, what

would be necessary in the way of treatment to make that unfinished gasoline comply with U. S. motor gasoline specifications 58-60?

A. In connection with the filter towers. It would have to be sweetened; in the absence of a filter tower—in the absence of the vapor filter towers it would either have to be treated with acid and re-run and then later treated.

X Q. What was the purpose of acid treating and re-running?

A. To purify it.

X Q. To take out the sulphur?

A. Make it purified and make it sweet to the doctor test, yes.

X Q. And to reduce the sulphur content?

A. Yes, sir.

[fol. 358] X Q. What would be the approximate cost per barrel of acid treating and re-running?

A. Well, of course now we didn't do that with our plant. The approximate cost of that, I should say would be around ten cents.

X Q. Ten cents a barrel?

A. Yes, that is approximately.

X Q. You know as a matter of fact what the characteristics were of the gasoline produced in your Cross cracking plant in the winter of 1927 and the fall of 1926?

A. Yes, sir.

X Q. Can you state the intermediate boiling point?

A. Well, I could give you some close to the immediate boiling point. Right along on a par with U. S. motor.

X Q. You couldn't state in figures then what those boiling points were?

A. Yes, I can give you the figures on it. The U. S. figures is 131 initial, 221 at 20%, 284 at 50%, 392 at 90%, and an end point of 437, sweet to the doctor.

X Q. Can you state where the tanks were placed in your plant in which this Cross cracked gasoline was stored in reference to the other tankage?

A. Now are you speaking of the Cross——

X Q. Yes.

A. The finished stuff?

X Q. Yes, the finished Cross cracked gasoline?

A. It was on the south side of our plant.

X Q. That was at a different part of the tank farm or where your straight run was stored, was it not?

A. Not necessarily, no.

X Q. Did you ever have any experience with treating cracked gasoline before your experience with this particular cracked gasoline at the Champlin plant?

A. Treating with acid?

X Q. Treating cracked gasoline of any kind?

A. Oh, yes.

X Q. Where?

A. Southern Refining Company at Somerset.

X Q. What type of treating did you use there?

A. Acid treatment.

X Q. Acid treating and re-running?

A. Yes, sir.

Direct examination resumed.

By Mr. McKeever.

Q. I will ask you, after you had supplied your plant with a treater and were manufacturing a cracked gasoline, did [fol. 359] your plant make a gasoline complying with the U. S. motor specifications?

A. Yes.

Q. Did it manufacture and could it manufacture out of that cracked gasoline a gasoline better than U. S. motor?

A. Yes. In fact, there is a slight increase in the value. What I mean to say, we could get slightly more money for the no-knock gasoline than we could for the U. S. motor. I think our marketing department and Mr. Champlin would bear me out in it.

Q. Then it was a fact when you got a treater you made a gasoline that you could get as strong a price or better, made a no-knock?

A. Than the U. S. motor?

Q. Than the U. S. motor specifications?

A. Yes.

Cross-examination resumed.

By Mr. Marsh:

X Q. Just one more question on that. What was the sulphur content in percentage of the unfinished Cross cracked gasoline manufactured at your plant?

A. Well, I would have to take a guess at that. I couldn't say right offhanded, but I think it was—probably I might have something at the hotel that I could get that record from.

X Q. I would like to have the exact figures.

A. Well, I couldn't give you the exact. I will get it for you.

Direct examination resumed.

By Mr. McKeever:

Q. Will you get me the record if you have got it?

A. Yes, sir.

Q. Now that brings on another question or at least what we have developed here brings on another question. When you state that you got more for your no-knock gas than the gasoline of U. S. motor specifications. Now you get a gasoline in that plant and could make it and did, that met the U. S. motor specifications?

A. Yes.

Q. Now did you get a stronger price for your U. S. motor specifications than other refiners?

A. Well, I think we did, yes. I am not sure.

[fol. 360] Q. Basing that on Mr. Leverton's chart now, so that you do not use your own knowledge for that, but Leverton's chart?

A. Yes.

Mr. Marsh: I don't think he is qualified to testify on price. The witness has stated again and again it is estimate.

The Court: As to his knowledge I don't know.

Mr. McKeever: I don't care to pursue it any further. There is some argument here whether or not is was important. That is all.

Cross-examination resumed.

By Mr. Marsh:

X Q. You say that you are making a better gasoline than the U. S. motor gasoline, but you don't know what the sulphur content is, and the sulphur content is one of the specifications of U. S. motor. How can you make that answer?

A. The sulphur content isn't a specification of the U. S. motor. It must be sweet to the doctor test, which the gasoline was.

Mr. Marsh: I don't think you are right, Mr. Slater, but I wouldn't quarrel with you, because I don't know enough about it myself.

Mr. McKeever: That is all.

Mr. Marsh: I will correct that with another witness.

Mr. McKeever: Your Honor please, we now rest our main case. Your Honor, the Clerk calls my attention to a No. 60 that was offered in evidence and he had referred to the Court for examination. Has anybody——

The Court: It wasn't introduced in the evidence.

Mr. McKeever: It was merely identified, perhaps. We will run that down for you, Mr. Clerk.

The Court: Here it is, I guess.

Mr. Jones: No. 60 was excluded temporarily.

The Court: Excluded, yes.

Mr. McKeever: That is right.

The Court: It isn't an exhibit.

Mr. McKeever: I had it marked.

[fol. 361] The Court: It isn't in evidence. It cannot be an exhibit.

Mr. Jones: Dated March 29, 1923.

The Court: Marked for identification.

Mr. McKeever: I term it as an exhibit as far as the record goes. You object still?

Mr. Marsh: Yes, I object.

Mr. McKeever: I think it isn't of any particular importance to raise an argument about it.

The Court: I don't think it is either.

Mr. McKeever: Let the record show that we withdraw Defendant's Exhibit No. 60, and that will cure the whole thing.

The Court: Make the record accordingly.

PLAINTIFF'S EVIDENCE RESUMED

CHARLES H. WELLING, called and sworn, testified:

Direct examination.

By Mr. Marsh:

Q. Mr. Welling, will you state the connection that you had to do with the Gasoline Products Company in December, 1925?

A. Vice-president and director. Also stockholder to a small extent.

Q. Will you describe briefly the business which was being conducted at that time by the Gasoline Products Company?

A. It was licensing the use of the Cross cracking process.

Q. What was the nature of the property owned by the Gasoline Products Company?

A. Patent rights.

Q. Did it have any patents? Issued patents?

A. It had some issued patents and a number of pending applications both in the United States and in foreign countries.

Q. Did it have any plants or physical property of any kind?

A. None whatever.

Q. Have you stated the entire business conducted by the Gasoline Products Company in December, 1925?

A. I believe I have.

Q. It was confined to licensing?

A. Confined entirely.

[fol. 362] Q. Will you state whether the Gasoline Products Company had the right to issue licenses under patents owned by some other companies, as well as its own?

A. It did.

Q. Now, I want to show you the exhibit, the license agreement which is attached to the claim in this action, and ask you to look at the schedule of patents which is attached there. Now those patents are classified, or grouped, rather, under a number of different groups, are they not?

A. Yes, sir.

Q. Will you state the headings under which the patents are listed?

A. Gasoline Products Company patent, Lewis patents, The Texas Company patents, Standard Oil Company, Indiana, patents, Standard Oil Company, New Jersey, patents, Black patents.

Q. Will you state now whether any of the patents listed in that schedule belong to Gasoline Products Company other than the patent listed under Gasoline Products Company?

A. I believe they have an interest in the Black patents; other than that, none.

Q. Now will you tell the jury briefly the nature of the rights that your company had to license—to issue licenses under the patents of these other companies which you have named?

A. It was to license the Cross cracking process as defined in that agreement.

Q. You had no general right to license?

A. No, sir.

Q. In the questioning of Mr. Harvison or Mr. Champlin, I have forgotten which, Mr. McKeever referred to a suit which had been commenced by the United States Government in which the Gasoline Products Company had been named as the defendant, and in either the question or the answer it was stated that the nature of that suit was to prove the Gasoline Products Company an illegal corporation for holding patents, or some such thing as that. Can you tell the jury what the nature of that suit was? Do you remember?

A. The Government charged that the so-called cross licensing agreement, that is, the agreement between ourselves and the other patent holding companies, under [fol. 363] which we acquired that limited right to license, the Government charged that those agreements were in violation of the Anti-trust Act.

Q. That is all I want to know. Now you know, and if so, will you state, what has occurred in that suit?

A. An expedition court was appointed, a Master appointed, testimony taken, and the Master dismissed the bill, as I understand it.

Q. Do you know what the status of the case is at the present time?

A. I believe it is waiting a decree on the Master's Finding.

Q. Now will you state what connection you had in December, 1925, with the Cross Development Corporation?

A. Vice-President, Director, and a small stockholder.

Q. Will you state what the business of that corporation was?

A. Its business was to hold certain patent rights that had been developed by Dr. Cross or his brother, that related to or covered inventions of Dr. Cross and his brother, and to attempt their development or exploitation.

Q. Can you state briefly what some of those patents were?

A. I think the first proposition we took up related to high-pressure boilers for steam, an invention of Dr. Walter Cross. The next proposition was this treating proposition, which divided itself into several headings, some of the inventions having been made by Dr. Walter Cross and some by Dr. Roy Cross. Particularly we had patents relating to treating gasolines in liquid phase. We had inventions covering the treatment in the vapor phase, and there are other inventions relating to treatment with metal salts and what not, which are still in a somewhat nebulous state.

Q. Will you state what the authorized capital of the Cross Development Company was in December, 1925?

A. The authorized capital was $50,000, which had been underwritten by the subscribers, as I recall, at that time either twenty or thirty thousand dollars had been called up only. I know that only thirty thousand had been called up to date. I forget whether we made up one call of twenty and a following call of ten, or whether it had all [fol. 364] been called at that time. Certainly not more than thirty thousand dollars.

Q. Has that corporation ever made a net profit from its operations for a year?

A. No, sir, it has not.

Q. You spoke of the subscribers to the capital stock. Will you state who the subscribers were? I don't mean by name, but as a group.

A. The stock of that company was offered to the stockholders of the Gasoline Products Company, not to all of them, but to most of them, and the stockholders of the

Cross Development Corporation are all stockholders in Gasoline Products. The two lists are not identical. Some of the Gasoline Products stockholders did not subscribe and the Cross Brothers having subscribed to a larger participation in the Cross Development Corporation than they had in the Gasoline Products.

Q. So there is not a complete identity of interest?

A. No; no, quite far from it.

Q. There were certain stockholders in one who were not interested at all in the other?

A. Not interested at all; correct.

Q. You heard the testimony of Mr. Harvison this morning with reference to the relationship and contracts between the Gasoline Products Company and the M. W. Kellogg Company. I will ask you to state whether that conforms substantially to your understanding of those relationships and those contracts?

A. Yes, it does.

Q. Will you now state what if any connection there was between the Gasoline Products Company and the Cross Engineering Company in December, 1925, and at any time during the period from December, 1925, until the Cross Engineering Company was sold to the Kellogg Company in June, 1926?

A. I don't think we had any connection with them at all, except such as might be implied by their being the selling agent in that territory for the Kellogg Company, who were the agents of our cracking license, or except as we may have authorized that company to undertake the development of certain apparatus or attempt to seel it for treating, which was never consummated.

[fol. 365] Q. When you say "we" in connection with authority given to the Cross Engineering Company, with reference to treating, whom do you refer to?

A. The Cross Development Corporation. There was no other connection, no connection between the Gasoline Products and Cross Engineering at all, except through the Kellogg Company.

Q. So that the authority of Mr. Keith depended upon the authority of the Kellogg Company?

A. Entirely.

Mr. McKeever: I object to that.

The Court: That may be a legal question.

Mr. Marsh: All right, sir, I will withdraw that. He has already stated that there were no contractual relations.

The Court: Yes.

Q. I will ask you now to describe the status of the development work of the Cross Development Corporation on the Cross Vapor Phase treating system in December, 1925, as far as you can now remember?

A. So far as I was aware of it, it consisted entirely of laboratory experiments which had been conducted in Dr. Cross's laboratory.

Q. Where?

A. In Kansas City. I do not recall that I had ever seen any drawings made, and I do not recall anything other than a general description of the operation, that it was to be an operation for the treatment of vapors by filtering through clay with an improved result to be realized by copperizing the clay in some method.

Q. Will you state your recollection as to whether or not in December, 1925, or in January, 1926, any plans or drawing had been made for a commercial sized installation of the Cross Vapor Phase treating system?

A. Not to my knowledge.

Q. You have spoken of the liquid phase treating process. Where, if anywhere, was there a commercial installation of that process?

A. An installation had been made by the Clayton Oil & Refining Company, Dallas, Texas, later acquired by the Sims Company.

[fol. 366] Q. That was on a commercial scale?

A. Yes, sir, that was. That treated the product of a Cross cracking installation.

Q. Will you state whether or not that was in operation in that fall and winter of 1925.

A. I believe it was.

Q. Is it still in operation?

A. So far as I know, it is. I think they kept it in operation right along. The last I heard of it they had it in operation.

Q. What were the terms upon which that installation was made?

A. The Cross Development Corporation gave them a free license in consideration of their installing the equipment and permitting us, the Cross Development Corporation, to use it for demonstration purposes to other intending licensees.

Q. Will you state when you first heard of the negotiation between Mr. Harcourt and Mr. Keith and the Champlin Refining Company with reference to installing a Cross Vapor Phase system in connection with the Champlin cracking plant?

A. I couldn't be entirely sure. I might have heard the subject discussed by Mr. Harcourt before he left Kansas City. That would have been early in the fall of '25; but I do remember of having heard him at that time discussing the prospect of selling Mr. Champlin a cracking process. I don't think I heard him discuss the possibility of selling him a Vapor Phase treater. I should say that I first heard of it from Mr. Keith in December of '25 or January of '26.

Q. Was it the policy or the practice of the Cross Development Corporation to invest large sums in these experimental devices?

Mr. McKeever: I object, if Your Honor please. Immaterial.

The Court: Do you think that is material, Mr. Marsh?

Mr. Marsh: I don't press that question. He has stated what the capital was.

Q. Did its resources permit a large investment of any kind—the Cross Development Company's?

A. They did not.

Q. What plan was developed by the management of the Cross Development Corporation for exploiting this Vapor Phase treating system?

A. We developed the idea of trying to get some refiner [fol. 367] to put in one experimental installation which, if successful, would then furnish the basis for a licensing or selling business. We had to have one installation installed and operating on a commercial scale before we could do anything, and we tried to get that with some one appropriate refinery in the Mid-Continent Field.

Q. You were interested in having such an experimental unit in connection with a cracking plant, Cross cracking plant?

Mr. McKeever: If the Court please we are getting on tender ground. I would suggest to Counsel, or I would address myself to the Court that he suggest to counsel that the question is leading.

Mr. Marsh: I will be careful. I have been trying to lead up to this as quickly as I could, because I wanted to come to the actual negotiations.

The Court: It is important, especially on matters in dispute, that your questions be framed so far as possible to avoid that objection.

Mr. Marsh: Yes, Your Honor, I will sincerely try.

Q. When did you first meet any representative of the Champlin Refining Company at any time?

A. On January 27, 1926.

Q. Upon what occasion was it that you had this meeting?

A. I went to Enid, Oklahoma at Mr. Keith's request.

Q. Where did you go to Enid from?

A. I went there from Dallas, Texas, and on my way to Kansas City.

Q. What was the occasion of your trip to Dallas?

Mr. McKeever: I object to that as immaterial.

The Court: It seems to be immaterial, to have nothing to do with this.

Mr. Marsh: Your Honor, the purpose of that is simply to show that it was a casual trip. Mr. Champlin testified that he came from New York to have this conference, and I will offer to prove that Mr. Welling had already been in the West for a period on some other matters having nothing to do with this situation, and that this was simply a casual visit.

The Court: He happened to be at Dallas on business, is that right?

[fol. 368] The Witness: Yes, and Wichita Falls and Kansas City.

The Court: The nature of it is not important.

By Mr. Marsh:

Q. The nature of your business was totally disconnected with the Champlin Refining Company, was it not?

A. Yes, I had to see Mr. Keith on that trip West.

Q. What first occurred when you and Mr. Keith went to Enid on January 27th?

A. We discussed our general business relating to the——

Mr. McKeever: Well, if the Court please, I object to that now, because the question does not involve the discussion of his general business or something else.

The Court: Conversations between him and Mr. Keith are hardly admissible, anyway.

Mr. Marsh: We haven't characterized the conversation, as I remember it.

The Court: Yes, he has.

Mr. Marsh: All right, I won't press that.

The Court: You better withdraw that for the moment. This is the point where you are getting now into conversations, and this is the point where we will take a recess for ten minutes, Gentlemen.

(Recess.)

Q. Can you state, Mr. Welling, whether the question arose, and, if so, at what time, as to the terms upon which Cross Development Corporation would issue a license for its treating process?

Mr. McKeever: With whom and when?

Mr. Marsh: In the management of the corporation.

Mr. McKeever: What corporation, may I inquire?

Mr. Marsh: Cross Development Corporation.

Mr. McKeever: We object to that for the reason it is not binding upon us.

The Court: I think the objection is well made. What came up is not so important as what they did and what they said.

Mr. Marsh: I am simply trying to get the date.

[fol. 369] Mr. McKeever: I think I will withdraw the objection. I don't think it makes any difference.

(Question read.)

A. The question arose—I am not entirely clear as to just when the first time it came up. I should imagine late in the fall of 1925.

Q. Do you remember whether such policy as was adopted was considered in connection with the Champlin Refining Company at any time?

A. Oh, yes; it was considered.

Q. Was a request made to you at any time for a statement of the terms upon which that process could be offered by Cross Development Company to the Champlin Refining Company?

A. Yes; Mr. Keith asked me on what terms we would license to Champlin.

Q. Do you remember when that occurred?

A. That occurred on January 9, 1926.

Q. Do you remember the occasion on which it occurred?

A. I remember the occasion because Mr. Keith came to see me at my office in New York.

Q. Did you make any statement to him at that time?

A. I told him the terms and gave him a letter which would cover the terms.

Q. Have you a copy of the letter with you?

A. I have. (Witness produces same.)

The Court: This refers simply to the vapor phase treating?

Mr. Marsh: Yes, Your Honor.

Q. Will you state the date of the letter?

A. January 9, 1926.

Q. To whom was it directed?

A. P. C. Keith, Esq.

Mr. Marsh: I will ask to have this marked as "Plaintiff's Exhibit F."

(Letter marked "Plaintiff's Exhibit F.")

Mr. Marsh: I offer this in evidence.

The Court: Admitted. Will you read it?

Mr. Marsh: Yes. If I may. (Reading:)

[fol. 370] Cross Development Corporation

January 9, 1926.

"P. C. Keith, Esq., Cross Engineering Company, 700 Baltimore Avenue, Kansas City, Missouri.

Dear Mr. Keith:

Subject: Vapor Phase Treating

As you know, we are very anxious to secure at the earliest possible date an installation of our vapor phase

treating process. To secure such an installation we are prepared to give a free license if the installation is made in connection with the Cross cracking process. This free license would, of course, apply only to the first installation made as we will expect on the basis of the results achieved to determine the appropriate license charge.

We will issue a license to cover this installation which will follow in principal the language of the Gasoline Products Company license covering the Cross cracking process and will include a provision in substantially the same language as Paragraph 6 of the Gasoline Products Company's license, in accordance with which we will undertake the defense of any suits instituted against the licensee for infringement.

Very truly yours."

Signed by the Vice President.

Q. Did you sign and deliver such a letter to Mr. Keith?
A. I did.
Q. January 9, 1926?
A. I did.

The Court: The record will show that it was signed by him—by Mr. Welling.

Mr. Marsh: Yes.

Mr. McKeever: Yes, sir.

Q. Mr. Welling, did you at the same time——

[fol. 371] Mr. McKeever: Mr. Marsh, it has been suggested that we ask for the original of that letter. While we didn't object to the contents of it, I notice that it is a copy. Have you the original?

Mr. Marsh: I will account for the original in the testimony later. The original was delivered to one of your people.

Mr. McKeever: Will you account for the original?

Mr. Marsh: Yes. I can't do it through this one.

Mr. McKeever: No. All right.

Mr. Marsh: You see he wouldn't have the original.

Mr. McKeever: No.

Q. Upon the occasion of your delivering this letter to Mr. Keith, was any statement made as to the financing

of such an experimental installation as was referred to in that letter?

A. I am not entirely positive. I think I probably told him that we would be prepared to pay for one unit of such an installation.

Mr. McKeever: Now, if the Court please, of course I don't desire that we be bound by any such conversation between this witness and Mr. Keith, and I——

The Court: You aren't bound by it.

Mr. McKeever: I ask that that answer be stricken.

The Court: I don't think it should be. It is supplementary matter to that, involving the terms.

Mr. McKeever: Well, without argument, may we have an exception?

The Court: Yes.

Q. That letter refers to the provision of the Gasoline Products Company license. Will you state whether or not the Gasoline Products Company had at that time a standard form of license?

A. It did.

Q. In what shape was that document?

A. It had a standard form printed, for use in the selling efforts of the Kellogg Company.

Q. Was the license later issued to the Champlin Refining Company in similar form to that standard?

A. Substantially so. I don't know in what minor par-
[fol. 372] ticulars it may have been changed. Nearly all licenses—license contracts—are changed in some minor respect from the standard printed form.

Q. So far as you know there was no material changes?

A. I don't think there were any material changes at all.

Q. Well, what was the next occasion on which the matter of the issuance of a license for the vapor phase treating system came up, if you remember?

A. On January 27th at Enid, Oklahoma.

Q. That was on the occasion you testified to before the adjournment?

A. Yes, sir.

Q. Now, who did you see with Mr. Keith on the occasion of that visit?

A. I saw Mr. Champlin and Mr. Slater who I understood was the superintendent of the refinery.

Q. Which Mr. Slater was it?

A. I think it was a brother of the Mr. Slater who is present in court. I remember his name as being Mr. Slater.

Mr. McKeever: We will admit that he means P. E. Slater.

Q. Where did you meet Mr. Champlin and Mr. Slater?

A. We went to Mr. Champlin's office, Mr. Keith and I, and almost at once got into Mr. Champlin's motor and went with him to the refinery where we met Mr. Slater, and all four talked for a while, and then we went back to the hotel. Mr. Champlin dropped us off. And later in the day I saw Mr. Champlin in the corridor of the hotel for a moment before I left to take my train.

Q. Now, I won't ask you what was said, but I will ask you what matters were discussed by these—or at these two meetings you had with Mr. Champlin?

A. The Cross cracking process and the prospective installation of it on the part of Mr. Champlin; and the vapor phase treating process and the prospective installation of it.

Q. Now, will you state what statements you made to Mr. Champlin with reference to the ownership of the Cross vapor phase treating process and any patents or patent applications relating thereto?

A. I told him that such ownership lay in the Cross Development Corporation.

Q. You made that clear?

A. I did. Very clear.

[fol. 373] Q. Did you make any statement to Mr. Champlin as to the terms upon which the Cross Development Corporation would be prepared to issue the license for this vapor phase treating process?

A. I did.

Q. Explain what was said?

A. I told him that we wanted to get one installation to demonstrate the process, and that he could have a free license if he was the first refiner to put in such an installation; that we would charge him no royalty for it; that the license terms would be simple; the requirement being principally the recording of the fact of his having taken a license under our patent. That they would cover—the license would cover—the grant of rights—his obligation to assign any improvements made in the operation to us, the

defense of litigation on our part without any liability—without any responsibility to be liable for a judgment—simply the cost of the defense of any litigation.

Q. You are now referring to a patent suit?

A. Yes, that might be brought against his operation of the vapor phase treating tower, to restrain his operation, charging infringement on some other patent; and then the fact of it being free for his own use—that is, limited to his use at Enid, Oklahoma, in connection with his refinery, in connection with the existing refining capacity or any enlargement of it.

Q. You are referring to the treating apparatus?

A. We wouldn't give him any free right to this treating apparatus that he could use elsewhere. No right he could assign to anyone else, as the purpose was to give a demonstration for us.

Q. What statement did you make to Mr. Champlin with reference to the financing of the cost of this installation?

A. I told him that as we understood it the cracking plant that he was planning to install would probably require three treating towers, and that in order to get this demonstration made the Gasoline Products Company was willing to advance the money to the Cross Development Corporation that would cover the erection of one of those towers. I told him it would be useless to build three towers until we had the results on one. That his purpose would be [fol. 374] entirely served by having one built at our expense and then, if it was successful, he could very promptly build the other two that would complete his installation.

Q. Did you make any statement or explanation to Mr. Champlin as to the status of that process? That is whether it was operating or merely in the laboratory stage——

A. I told him very clearly it was a laboratory process and we hadn't had any drawings made up. It was our hope and expectation that it would work; the purpose of our proposition to him was to find out whether it would work or not.

Q. You made all that perfectly clear?

Mr. McKeever: Oh, I object to that repetition.

The Court: You may exclude that.

Q. Did you make any statement to Mr. Champlin at that time as to the cost of operation of the Cross vapor phase treating tower? This experimental system?

A. None, other than I told him we had made no calculation. We would have to let them go until we put in the installation and find out what it was. We couldn't even make a close estimate of it. We didn't discuss cost with him, beyond saying that we would find out what it was after the installation is built.

Q. Did you make any statement to Mr. Champlin at that conference, or those conferences, with reference to the matter of the patent infringement? As affecting the Cross vapor phase treating tower.

A. Yes. I told him that the Gray Processes Corporation had perfected and reduced to commercial practice a process of purifying these vapors with clay and that they had it in operation at one or two points in the mid-continent field. That they would probably regard any operation of a so-called Cross process as an infringement of their patent. That I had caused the subject to be investigated by our patent attorney in Kansas City, a Mr. Schofield, and that he had told us he felt we were reasonably safe to go ahead; that he could assure us, so far as you could in advance in such matters, that we were reasonably safe.

[fol. 375] Q. And you believed Schofield?

A. I was taking Mr. Schofield's opinion. Yes.

Q. To your own knowledge—don't answer if you can't answer from your own knowledge—had Mr. Schofield been to Enid prior to the date on which this conference took place; January 27, 1926?

A. He may have been there. I can say on my own knowledge that he had not been to see Mr. Champlin in connection with treating, but he had traveled around the country a good deal. He may have been in Enid before.

Q. I will ask you now whether you know on what date Mr. Schofield did go to Enid, Oklahoma, to see Mr. Champlin?

A. I don't.

Q. Have you any information on the subject?

A. I have none. No, sir.

Q. Will you state now, Mr. Welling, whether at this conference on January 27, 1926, the discussion of the vapor phase treating system tower was connected with the discussion of the Cross cracking plant?

Mr. McKeever: If the Court please, I desire to interpose an objection to that.

The Court: I think that is too general. I think you will have to ask him——

Mr. McKeever: And while I am on my feet, for the purpose of calling the Court's attention and as well counsels' attention to this discussion, I would like to have the Court enforce the rule with reference to having the witness detail these conversations without the question suggesting what counsel desires the witness' answer to produce.

The Court: Well, what you mean, you want to avoid any leading questions.

Mr. McKeever: I have called attention to it a time or two and I am now emphasizing that in the way I state it, because it has to do in my opinion with a violation of our rights in the matter. He should rely on memory and give the conversation without its being detailed in the question. [fol. 376] The Court: It is better to have him volunteer the information about the conversation as far as possible.

Mr. McKeever: The conversation detailed with a great many or several subject matters.

The Court: Ask him to give the conversation on this point and that point.

Mr. Marsh: Strike out that last question.

Q. Now, Mr. Welling, will you state any conversation that you had with Mr. Champlin in relation to the installation of this Cross vapor phase treating process in connection with the cracking unit?

The Court: Let him state all the conversation.

Mr. Marsh: Any further conversation than you have now related.

The Court: You asked him to state any conversation. He better state all the conversation.

Q. Yes, all the conversation. In addition to what you have already related.

A. I told Mr. Champlin that the two propositions were not related.

By Mr. McKeever:

Q. Were not what?

A. Were not related. That Mr. Keith representing the Kellogg Company was authorized to speak as far as the cracking process was concerned, and that although I was

vice president of the Gasoline Products Company I would not cross wires or interfere in any way with his authority in the field in such a negotiation, by having anything to do with that myself, that I could give him general information as to the relations of the two companies and their patent holdings and patent rights, and tell him what the Cross Development Corporation and the Gasoline Products Company would be ready to do separately in regard to a treating installation, that if he put in the cracking installation the Cross Development Corporation would be glad to make this proposed license for a treating installation. I suggested to him that if he put in such a tower if it were successful and he completed the installation that that would then give him an advantage over other methods of treating, the conventional acid and caustic treatment or the Gray, by virtue of the fact of having put in this experi- [fol. 377] mental unit he would not have any royalty to pay. He would have a free license for that particular installation.

Q. That in substance is all that you remember of the explanations and statements that you made to Mr. Champlin on that occasion?

A. As well as I can remember that is all I told him on that subject.

Q. How long a period did these two conversations occupy? You spoke of one in the morning, I believe, and one in the evening.

A. Why, we were out at the refinery for, oh, I should say a matter of an hour or two. I took very little part in the conversation. Most of it was between Mr. Keith and Mr. Champlin and Mr. Slater, and related to the cracking installation and the terms of the construction contract, and what the cracking plant would produce and all of that. They simply asked me to clear that up on one or two points. The most part I took in it was listening.

Q. And in the evening?

A. In the evening we didn't discuss any business matters at all, just a social "How do you do" and "Good by". I was taking the train and was glad to see them, etc.

Q. You remember any statements that were made by Mr. Champlin in connection with this matter of vapor phase treating at either of those—the first conference?

A. Why, yes, he said it was very interesting, but it was not in shape for a definite discussion. He hadn't made up his mind what cracking he was going to use, and put a different light on his general consideration of cracking.

Mr. McKeever: Excuse me, did I understand he said—are you repeating what Mr. Champlin said?

The Court: Yes.

(Answer read.)

Mr. McKeever: I object to that last part. That is his conclusion about what light was put on it.

The Court: I understood that was what Mr. Champlin said.

Q. I didn't so understand it. I understood after he related what Mr. Champlin said he said it put a different light on it.

[fol. 378] A. I understood him to say that our discussion that day had thrown light on his consideration of the general subject of cracking. He was considering cracking at that time, going into all the processes, and when we parted I understood him to say our conversation had been helpful and had given him some light on his attempt to reach a conclusion.

Mr. McKeever: I have no objection now.

Q. Now on the occasion of this conference, Mr. Welling, was there any reference made to the offer which has been referred to in the testimony here made by Mr. Koch to Mr. Champlin?

A. Yes. The question was raised.

Q. Did you make any statement to Mr. Champlin as to the statements of Mr. Koch or his right to offer the Cross process?

A. I did.

Q. Will you relate what that statement was?

A. I told Mr. Champlin that I understood Mr. Koch's offer was supposed to be under a license issued by the Gasoline Products Company to Charles F. deGanahl, that if such were the fact and his offer related to a possible sublicense, under that license——

Mr. McKeever: Just a minute.

The Court: He hadn't finished his answer.

(Answer read.)

A. That I did not consider the rights of the deGanahl license was sufficiently broad to protect Mr. Champlin in the operation that he would want to practice. The deGanahl license had been issued in 1923 before we acquired some of our licensing rights from these other patent holding companies, and had not been extended to include those rights. It had been issued at a lower rate of royalty and Mr. deGanahl hadn't chosen to pay an increased royalty and accept those later rights. Consequently we did not feel that his license would protect the term bubble tower operation. That is the fractionating part of the cracking equipment that was then part of our standard design, and that I felt that if he took a license from Mr. Koch under that deGanahl license he would not have adequate protection for the type of operation that Mr. Keith was trying [fol. 379] to sell him for the Kellogg Company and Gasoline Products Company.

(Pamphlet marked Plaintiff's Exhibit No. G.)

Q. I show you an instrument marked Plaintiff's Exhibit G referred to on the cover as C. F. deGanahl contract of April 7, 1923, and ask you whether you can identify that as a copy of the license to Mr. deGanahl to which you have just referred?

A. It is.

Q. I will offer that in evidence. I will ask you to read the definition of the process under which Mr. deGanahl was licensed under that contract.

A. (Reading.) The Licensee is hereby granted a non-exclusive license upon the terms and conditions hereafter stated under the Letters Patent of the United States above enumerated and any United States, Great Britain or other Letters Patent under which the Licensor shall have the right to grant licenses pertaining to the cracking of oil under heat and pressure, to construct and operate at its plant or plants an installation or installations for cracking petroleum oils which consists of a heating coil and reaction chamber in which cracking occurs substantially in the

liquid phase and without substantial distillation at a pressure of upwards of 425 lbs., the contents of the reaction chamber being withdrawn and distilled at atmospheric pressure by the contained heat of the oil or otherwise and the gasoline obtained from such installations being purified and treated if desired.

Q. Mr. Welling, are you familiar with the installation that was made by the Medway Oil & Storage Company that was referred to in the testimony of Mr. Koch?

A. I am.

Q. That was the company, was it not, in which Mr. deGanahl was interested?

A. It is the company that he promoted which built a plant in England in which he was the largest individual interest.

Q. Can you state whether that plant had the fractionating equipment which was later installed in the plant of the Champlin Company?

A. It did, similar in type. There may have been some minor changes but it was the same type of apparatus.

[fol. 380] Q. Did Mr. deGanahl install that plant without further license agreement?

A. No. He took or rather the Medway Oil & Storage Company took a separate license from the Gasoline Products Company to protect that operation.

(Pamphlet marked Plaintiff's Exhibit H.)

Q. I hand you Plaintiff's Exhibit H and ask you if that is a copy of the license agreement between the Gasoline Products Company, Inc., as licensor and the Medway Oil and Storage Company Limited as licensee, to which you have just referred.

A. It is.

Mr. Marsh: I will offer that in evidence.

Mr. McKeever: If the Court will bear with me a minute, I would like to make a little comparison of this exhibit with the original that has been furnished me, but it seems I have misplaced that.

The Court: Perhaps you can go on with some other branch.

Mr. Marsh: It will only take a minute to clear this up.

Mr. McKeever: Mr. Marsh, for fear we may get confused, I am handing you back the one that has been identified. I would ask Mr. Marsh, just for the sake of time, if he could abandon this line on this just at this time until we look that over, and then come back to it again.

Mr. Marsh: I hoped I could clean up this conference and go on.

The Court: How long will it take you to look that up?

Mr. McKeever If you will wait a minute, we will try to accommodate Mr. Marsh.

The Court: I will wait a minute.

Mr. Marsh: It is a good deal of a side issue and I don't wish to cumber up the record.

Mr. McKeever: I don't think I am mistaken, Mr. Marsh. I think I know exactly what you have in mind, but I am trying to find it to make a comparison. If our engineer and their lawyer get into a discussion, Your Honor, as to what [fol. 381] one read and what one didn't, as they started to do, I think we are wasting time. That is the reason I took this book. I would like to do this in an orderly way.

The Court: All right.

Mr. McKeever: For the purpose of passing on, I will allow that to be offered in evidence and then we can apply whatever argument we have to it later and point these matters out.

Mr. Marsh: This contract is dated May 16, 1924. To save time, I will read the process covered by that license appearing on Page 3 (reading):

"A process of oil conversion characterized by the following: The oil to be converted is heated to or above a cracking temperature while in transit through a heating tube or coil and is then passed continuously into and through a reaction chamber in which cracking occurs without substantial distillation at a pressure of at least 425 pounds per square inch (above atmospheric measured in the reaction chamber), and from which a synthetic crude oil is withdrawn and is permitted to attain a pressure of not more than 15 pounds per square inch above atmospheric without further treatment other than cooling."

Then there is more I am not interested in.

I will also call attention to the fact that this license enumerates a number of patents on Page 4 under this heading:

"Patents of the Standard Oil Company (New Jersey). Assignee of Standard Oil Company (Indiana)."

Then there is a list of six English patents.

"Standard Development Company Patents."

Then two of those.

The licenses extended under those patents.

Also some patents listed on Page 6 under the heading "Texas Company Patents." There are three of those British patents.

Q. Mr. Welling, that license was issued to the Medway Company on the date mentioned, was it not?

A. In 1924, yes, sir.

Q. Now, going back to the conference of January 27 at Mr. Champlin's office, did you explain to Mr. Champlin the [fol. 382] necessity for further patent protection that Mr. deGanahl had?

A. I explained to Mr Champlin that it had been necessary for the Medway Oil and Storage Company to secure a new license from the Gasoline Products Company to protect their operation of the existing plant on the Thames-in England, because they couldn't practice that operation with the equipment they had under the original deGanahl license, and therefore the operation could not be protected by a sub-license from deGanahl.

Q. Did you have any further conferences with Mr. Champlin or any of his representatives with reference to the matter of a Cross Vapor Phase treating system?

A. I did not.

Q. Will you state whether you had any conferences in New York with any representatives?

A. I did not. I had no further conference with any members of the Champlin organization.

Q. Will you state whether you ever saw the letter of February 6, 1926, directed by Mr. Keith, vice president of the Cross Engineering Company, to Champlin Refining Company, which has been referred to in the testimony in this trial?

A. I did.

Q. When did you first see that?

A. I first saw it when, I think it was, Mr. Harvison forwarded me a copy in August. I think I got my copy from

Mr. Harvison and not direct from Mr. Champlin. It was forwarded to New York, and the copy sent over to me. That is the first time I saw it.

Q. When did you first have knowledge of it?

A. When I saw Mr. Champlin's wire. I think August 2nd. Stating that such a letter was in existence.

Q. Between the 6th of February, 1926, and the time when you received that wire, had Mr. Champlin ever informed you in writing that he would install and pay for a Cross Vapor Phase system upon the terms that you suggested to him on January 27, 1926?

A. He had not.

Q. I should have said at any time between the date of that conference, January 27, 1926, and the receipt of that wire in August?

A. He had not.

[fol. 383] Q. Did he ever bring to your attention by any act that he had accepted or intended to accept such a Vapor Phase system treating tower?

Mr. McKeever: Now, if the Court please, I object to that for the reason that it is leaving it to the witness to be the judge of Champlin's acts. No objection to his stating what these acts covered. Let him relate what they did.

The Court: There is a little fine technicality there. He has testified nothing in writing was received by him from Mr. Champlin.

Mr. McKeever: I don't object to that.

The Court: Nothing referring to this at all—until this time in August. Now Mr. Marsh inquires in substance whether he received any verbal communications from Mr. Champlin in regard of the contents of that letter.

Mr. McKeever: I don't so understand him. He said "acts."

The Court: I am rephrasing it.

Mr. McKeever: No objection to the question with reference to verbal communications.

By Mr. Marsh:

Q. Did you receive any such verbal communications?

A. I did not.

Q. At any time subsequent to August 2nd or August 1, 1926, did you receive any written communication from Mr.

Champlin or from anyone representing him, stating in effect that Mr. Champlin desired to proceed with the proposal that was made by you on January 27, 1926?

A. I did not.

Q. At any time?

A. Not at any time.

Q. Will you state, Mr. Welling, whether at any time since January 27, 1926, there has been a commercial installation made of a Cross Vapor Phase system treating tower?

A. There has not.

Mr. Marsh: I think that is all, Your Honor.

[fol. 384] Cross-examination.

By Mr. McKeever:

X Q. Mr. Welling, you were in 1926, in January, you say, vice president of the Gasoline Products Company?

A. Yes, sir.

X Q. And, of course, a director?

A. Yes, sir.

X Q. How long had you been connected with that company up to that time?

A. I think since July or August of 1923. I am not entirely sure of the month, but it was in the late summer or early fall of 1923.

X Q. You continued to be such officer throughout the year 1926?

A. I did, yes, sir.

X Q. And are you such officer yet?

A. I am a vice president, but not a director.

The Court: You are talking of the Gasoline Products Company?

Mr. McKeever: The Gasoline Products Company, yes, sir.

X Q. Now the Gasoline Products Company, as you have explained, was a licensing company?

A. Yes, sir.

X Q. You had no physical assets?

A. No, sir, apart from designs and blueprints, and possibly from time to time a little experimental equipment

which we might have a small amount of money invested in, but not in the sense of plant or construction or anything of that nature.

XQ. You had just such assets as were necessary to own and control your patents and issue licenses thereon?

A. Correct.

XQ. You carried no money assets, did you,—cash?

A. None to speak of; no, sir. We had a bank account of course.

XQ. That was from your income from your licenses?

A. The income was disbursed as dividends. We maintained no large balance and no cash assets.

Q. How often did you disburse your dividends?

A. I couldn't say as to 1926. Possibly every quarter or possibly more often at that time; I am not entirely sure. I would have to refer to my——

Mr. Marsh: It seems to me this is going pretty far afield. There wasn't any question about dividends.

The Court: I know; but he is nearly at the end of it.

[fol. 385] Mr. Marsh: I have no objection to its going in, but it seems entirely irrelevant to the case.

Mr. McKeever: I was quite to the end of my idea of it with that question.

The Court: Quite remote, I think.

XQ. You said you had a right to issue licenses of other companies' processes?

A. No, sir.

XQ. Then I misunderstood you when you answered, when I made my notation. What was your connection with other companies when you made your answer?

A. The right to issue licenses to our process under their patents.

XQ. Under the patents of other companies?

A. Under the patents of other companies; yes, sir.

XQ. Are those the companies named in your license agreement?

A. They are.

XQ. How many different patents did they control that is mentioned in your license agreement?

A. I should have to refer to the license agreement. Quite a number.

By the Court:

X Q. About half a dozen weren't there?
A. Eighty or a hundred; something like that.

By Mr. McKeever:

X Q. I will not have you count them. I just want it approximately. I have counted eighty-seven. I will say for your information. Is that about right?
A. Yes.
X Q. Then the Black patent you had an interest in?
A. Yes.
X Q. You have yet?
A. Yes.
X Q. The purpose of the agreement existing between your company and the others named in the license agreement was to prevent conflict of your interests, wasn't it?

Mr. Marsh: I object to that, Your Honor. That is as broad as all outdoors.

The Court: I do not see any need of going into the Sherman anti-trust law. It has already come up that there was some question about it, and the matter has been closed. It has no bearing on this issue here.

[fol. 386] By Mr. Keever:

X Q. What was your connection with the Cross Development Company, did you say, Mr. Welling?
A. Vice president, director, and to a small extent a stockholder.
X Q. When did you become interested in that company?
A. Upon its formation, as I recall, in December, 1924.
X Q. Were you elected on the board of directors immediately?
A. Yes, sir.
X Q. Is that company still in existence?
A. Yes, sir.
X Q. Are you still on the board?
A. I am.
X Q. And you were vice president of that company then in the latter part of 1925 I understood you to say?
A. Yes, sir.
X Q. And throughout the year 1926?

A. Yes, sir.

X Q. Are still vice president of that company?

A. I am.

X Q. Have you been continuously throughout the time mentioned?

A. I have.

X Q. Then you were vice president at the time you visited Champlin at Enid?

A. Yes, sir.

X Q. Now, Mr. Welling, I have in my possession two instruments certified by the Secretary of State of the State of Delaware, one for the year 1925, and the other for the year 1926, which gives as the vice president of your company Mr. H. G. Atwater, and mentions you as a member of the board of directors. Could you be mistaken about your being a vice president at the time that you have mentioned?

A. I can't understand that. To the best of my knowledge and belief I was also vice president.

X Q. Mr. Atwater is the gentleman that accompanies you here,—this good-looking man at the end of the table, isn't he?

A. He is; yes, sir.

The Court: Was he made vice president on the basis of his looks?

A. I can only suggest that for the purpose of filing returns they only required one vice president, who may be designated as the vice president, and the company may have such other supplementary or additional vice presidents as it wants.

[fol. 387] X Q. Then you make vice presidents in your company at your convenience, do you?

A. No, sir; they have been the same since the company was formed, right through to to-day.

By the Court:

X Q. Do your by-laws provide for more than one vice president?

A. As I recall it they do.

By Mr. Keever:

X Q. Can you furnish us with a copy of the by-laws of that company?

A. I could.

X Q. Will you get those here by Monday afternoon or Tuesday morning?

A. Yes, sir.

The Court: You had also better get a copy of the records showing who was vice president.

By Mr. McKeever:

X Q. Will you furnish us that information, so you can testify absolutely?

A. Yes, sir. I can testify absolutely that I was a vice president at that time when the company was formed and have been ever since.

X Q. I am asking you now for the records?

A. I will produce a copy of the records.

X Q. Now, the Cross Development Company, of which you claim to have been a vice president and director, was a company organized by the Cross brothers, Dr. Walter Cross and Dr. Roy Cross, for the purpose of making development and experimenting with certain inventions of theirs, was it not?

A. Not quite that, no. It was organized by the firm of G. M. P. Murphy & Company, a banking house in New York, jointly with the Cross brothers.

X Q. This certified copy I have shows F. Osborn to be vice president. Is that true?

A. Yes, sir.

X Q. Who is he?

A. He is a special partner of the firm of G. M. P. Murphy & Company, and president of the Osborn Development Company. At that time he was a general partner in the banking firm of G. M. P. Murphy & Company, or rather at the time of the formation of the Cross Development Corporation in 1924.

[fol. 388] X Q. Is he in any way connected with any of these companies mentioned in your license agreement?

A. President of the Gasoline Products Company.

X Q. President of the Gasoline Products Company here?

A. Yes.

X Q. And Mr. Atwater is vice president of the Gasoline Products Company?

A. Yes, sir.

X Q. And what relation does Mr. W. S. Hood have with the Gasoline Products Company, if any?

A. I believe secretary and director.

X Q. In the directors here, M. Grayson P. Murphy, it looks like?

A. That is probably misspelled; Grayson M. P. Murphy.

X Q. That is what it means, no doubt; and Mr. Murphy is what with the Gasoline Products Company?

A. I believe he is still a director. He was at the time we are discussing.

X Q. Here is Mr. C. H. Sabine. Who is he?

A. Also a director.

X Q. Of what company?

A. Gasoline Products Company.

X Q. Is he a director in any of the companies mentioned in your exhibit to your license agreement?

A. Not that I know of, other than the Gasoline Products Company, no, sir.

X Q. Is he not an officer in one of the Standard Oil Companies?

A. No, sir.

X Q. He was not at that time, anyway?

A. No, sir.

X Q. Then besides yourself and Mr. Atwater, first mentioned as directors, we have W. M. Cross and Roy Cross. Those are the two doctor Crosses that have been referred to here a number of times?

A. Yes, sir.

X Q. The Cross Development Company had no physical properties either, did it?

A. No, sir.

X Q. You discussed in your other evidence, with Mr. Marsh's questioning, the personnel of the two companies, and stated that they were in a number of instances not the same, but there were some of the same personnel in both. Now how many——

[fol. 389] Mr. Marsh: My question did not say personnel. I was asking about stockholders.

By Mr. McKeever:

X Q. I will ask about stockholders. How many stockholders has the Gasoline Products Company got?

A. I couldn't say without refreshing my memory. I would have to see a list of them.

Mr. Marsh: I ask again that this question be placed in time.

By Mr. McKeever:

X Q. I will put it the time when you are dealing with Champlin?

A. I would have to look it up.

X Q. Were the Cross brothers at that time interested in the Gasoline Products Company?

A. Yes, sir; they were.

X Q. So that all of the stockholders of the Cross Development Company at the time you were dealing with Mr. Champlin were stockholders of the Gasoline Products Company?

A. Yes, sir; that is correct.

X Q. And the Gasoline Products Company you think might have had some more stockholders?

A. I know that it had some stockholders who were not interested in any way in the Cross Development Company.

X Q. Now, Mr. Harvison, the vice president of the Kellogg Company, is also a stockholder in the Gasoline Products Company, isn't he?

A. No- to my knowledge.

By the Court:

X Q. Was during that period?

A. Not to my knowledge. I am sure he wasn't.

By Mr. McKeever:

X Q. Was his company at that period interested in the Gasoline Products Company?

A. Yes, his company—I don't know whether it appeared at that time on the records as being a stockholder, but there had been a certain part of stock set apart in escrow for them, and certain of their commission credits on business was paid into that escrow with the view to their purchasing that stock. I think at the time we are discussing a small amount of that stock had been paid for, but none transferred or delivered to them.

X Q. They had at that time a contract with your Gasoline Products Company wherein they participated in the [fol. 390] royalties earned over a period of two years?

A. Yes; they had a selling commission on the two-year period following the installation, on the royalties.

Q. Was that on the plants sold and installed by them only or any plants that you were selling and installing of the Cross cracking units?

A. On all plants installed.

Q. Now, the Cross Engineering Company was composed of whom, at the time you were dealing with Mr. Champlin?

A. I think it was only composed of the two doctors Cross and Mr. Keith. But my information in regard to it is not sufficiently good for me to be able to say under oath that they were the only people who composed it.

Q. Well, at least it comprised those three?

A. Yes. They may have had some other stockholders, a treasurer and secretary and the like of that.

Q. Then, so far as you know, the common stockholders between the Gasoline Products Company and the Cross Engineering Company were merely the two Doctors Cross?

A. Yes.

Q. Mr. Keith wasn't a stockholder in your Gasoline Products Company?

A. No.

Q. When did you become acquainted with Mr. Keith? You, personally?

A. In the fall of 1925, shortly before he came to Kansas City and entered into his work with the Cross Engineering Company.

Q. Did you know a Mr. Guy N. Harcourt?

A. Yes, sir.

Q. He was selling your Cross cracking units prior to Mr. Keith's taking up that work?

A. Yes, sir. He represented the Kellogg Company in Kansas City.

Q. I haven't asked you who he represented. I said, he was selling them?

A. Yes, sir. He was.

Q. And when did he cease his work of selling these cracking units?

A. I couldn't say exactly. He moved back to the Jersey City Office at about the time they installed the Cross Engineering and Mr. Keith in Kansas City.

[fol. 391] Q. You mean the Jersey City office of what company?

A. Of the Kellogg Company.

Q. Then Mr. Keith, as I understand it, was the man who took Harcourt's place, but his employment came through the Kellogg Company and not directly through your Gasoline Products Company?

A. Well, that isn't quite right. His employment was with the Cross Engineering.

Q. Well, I am referring more particularly now to his employment as an agent to sell Cross cracking units?

A. Well, the Cross Engineering, as I understand it, was the agent of the Kellogg Company.

Q. Oh, there was an arrangement between the two corporations?

A. Between the two corporations. Yes, sir.

The Court: That is to say, the Gasoline Products Company authorized the Kellogg Company to act as its agent, and the Kellogg Company authorized the Cross Engineering Company to act as its sub-agent?

A. Yes, sir.

Q. Now, when you were negotiating with Mr. Champlin—or your Gasoline Products Company—to sell him the Cross cracking units, you knew of this arrangement between the Kellogg Company and Cross Engineering Company?

A. Yes, sir.

Q. And you knew that Mr. Keith was acting in the capacity of a selling agent of the apparatus on which your Gasoline Products Company already held the exclusive patent rights?

A. Yes, sir.

Q. Now, primarily you took over—that is, the stockholders of the—or part of the stockholders of the Gasoline Products Company—took over the Cross Development Company because it was developing this vapor phase treater with the copper added to the clay?

A. No, sir.

Q. What did you take it over for?

A. We formed the company to take up a series of inventions that the Doctors Cross had. The stockholders of the Gasoline Products Company thought they were in a fair way to make some money with the cracking process [fol. 392] and they would gamble some more on the inventions of the Doctors Cross. The first one was this steam boiler and we worked two years on that—two years or so—before this treating thing became an active subject at all.

Q. Do you know when Dr. Cross commenced his experiments on the treating towers? With reference to the time you formed the company? A. I couldn't say off-hand, but from my conversations with him I should have thought that his original experiment on that subject long antedated the formation of the Development Corporation.

Q. Then—Yes. Now, at the time of the formation of the Development Corporation—You knew at the time of the formation of the Development Corporation that Dr. Cross had made a series of experiments on vapor phase treating with the copperization of clay?

A. I couldn't say that I did. No, sir.

Q. Do you say you had no knowledge one way or the other with reference to his activities in that regard?

A. Let me put it that I knew he had conducted research over a great many years on the whole subject of treating. I had no special knowledge that I now recall as to what definite lines that was on—between liquid phase, vapor phase, copperized, metallic sodium—or what other phase of the treating problem his research may have led him to explore. I wouldn't say as to that. I simply knew he had been researching on the general subject of treating for a great many years.

Q. Did your Cross Development Company also own the rights of the Cross liquid treater?

A. Yes, sir.

Q. That I believe you said had been installed in what we term in our country the Simms Refineries—at Dallas—prior to the time you negotiated with Mr. Champlin for your Cross cracking license?

A. Yes.

Q. Did they ever put one of those in anywhere else?

A. I don't know. I heard some talk of their putting one of those in that refinery they had at Smackover, but I

couldn't testify from my own knowledge whether it was or was not put there.

[fol. 393] Q. Well, that liquid phase treater wasn't a success, was it?

A. My last information on it was that Simms—as you call them—were still practicing it. There is some effort, I believe, going on to make further installations. Oh, it isn't abandoned at all.

Q. Well, you haven't been able to convince anybody else, since you put in the Simms, with reference to——

A. (Interrupting:) Oh, yes.

Q. You have? Have you put in anywhere?

A. Yes.

Q. Where?

A. I have forgotten the name of the refinery. We entered into negotiations with the engineering firm called Smith & Leslie, at Kansas City, for the exploitation sale of that process.

Q. And——

A. They will make some new installations and if they are equally successful they will start in to sell them.

Q. Well, you are still developing that process, as a matter of fact, aren't you? Or trying to?

A. Yes, sir.

Q. Did they have these things called towers——

A. Well, now, I don't think I know about that. That is outside of my knowledge, a little; that sort of thing.

The Court: We will suspend here until to-morrow morning at half past nine.

(Suspended until 9.30 a. m. April 27, 1929.)

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Forenoon Session (Saturday Morning, April 27, 1929)

Mr. Marsh: Before the examination continues, Mr. Harvison asked me last night before he took the train to correct one statement that he made in his testimony. Now I can do it through Mr. Welling on re-direct or I can make a statement.

The Court: If you can do it with this witness, you may do so. Otherwise you will have to agree with counsel.

Mr. Marsh: All right.

The Court: Those are the only two ways to do it in his absence. You want to do it now?

[fol. 394] Mr. Marsh: No, I will wait.

Cross-examination of Mr. Welling resumed.

By Mr. McKeever:

X Q. Mr. Welling, you stated yesterday that the idea of installing a vapor phase system treating tower of the Cross kind for the Champlin Refining Company was suggested to you by Mr. Keith on January the 9th at a visit to your office. I believe that is correct, is it not?

A. It might have been suggested before that, but it was suggested at that time also.

X Q. He came there and discussed that with you?

A. Yes, he came there to discuss that purpose.

X Q. And as a result of that conference I understand that you issued him a letter—delivered him a letter. That is a carbon copy of letter that you gave him on that date, I believe you testified, Exhibit F (showing paper)?

A. Yes, sir.

Mr. McKeever: I hand the reporter an instrument I now ask to be identified as Defendant's Exhibit No. 65.

(Marked Defendant's Exhibit No. 65.)

Mr. McKeever: That I offer in evidence, as a part of the cross examination of this witness, except that lead pencil writing on the top of it, which I put on there myself at some future time.

Mr. Hale: Your Honor please, this exhibit is identical, as far as we can see, with one which we have already put in.

The Court: Is that true, Mr. McKeever?

Mr. McKeever: As far as the language of it is concerned; yes, sir.

The Court: What do you want another one for?

Mr. McKeever: One of them is a copy and the other isn't.

Mr. Marsh: They are both copies.

(Counsel confer with the Court at the Bench.)

The Court: You go ahead.

Mr. McKeever: I still want to offer it in evidence.

The Court: You may. That is Defendant's Exhibit 65. You offer that in evidence.

[fol. 395] Mr. McKeever: I want to ask Mr. Marsh if it will be admitted that Defendant's 65 is an instrument he furnished to me in April last year, except the pencil writing on the top of it?

Mr. Marsh: Sure. No doubt about it.

The Court: Yes, it may be. Can't you erase that? What is it, anyway?

Mr. McKeever: It is just my memoranda where I got it.

Mr. Marsh: There is no question where he got it.

The Court: I understand there is no question between counsel about that at all.

Mr. McKeever: I want to exhibit that and a companion exhibit to the jury but I will do that at a later time.

The Court: Very well.

X Q. Mr. Welling, I will ask you if on or about February the 8th you did not send a wire to deGanahl in England February 8, 1926, which reads as follows (reading): "Fred Koch soliciting Midcontinent refiners sublicense under your contract at six cents instead of nine cents as provided in contract and as against ten cents we offer stop we will of course cooperate should you desire construct or sublicense plant. This country but feels Koch's present efforts prejudicial our efforts secure business particularly as he seems misinformed quoting six cents royalty rather than nine cents stop if you desire arrange sublicense your American rights suggest you advise us basis on which offers can be made stop we will assist in any way possible but request you realize present situation unfortunate not promoting your interests and possibly damaging to ours Best regard." Did you send such a letter to Mr. deGanahl?

A. It sounds familiar, I wouldn't be able to swear as to the date and I would have to consult my own file, but I think I did. It sounds about like what we sent at that time, as I remember it.

X Q. Have you got the original of that in your own file with you?

A. I have not.

[fol. 396] X Q. Will you produce that if required next week?

A. I can consult my file and see if it is there, and if it is I can get it; yes, sir.

X Q. I will ask you if in response to that and on——

The Court: Wouldn't it be better to show him that instrument before you read it and ask him if that is what he received in reply? Otherwise you will get it in evidence without really of course going through the formality.

Mr. McKeever: All right. I am not claiming that I have got the original here. If the Court feels that I am taking any advantage of the witness in that I will let him read the telegram.

The Court: Anybody can tell better reading a long telegram than they can when you read it, with that word "stop" coming in every little while.

Mr. McKeever: The instrument that I now hand the witness also includes the reply from Mr. deGanahl, and I want him to examine that to see whether or not he received such a reply.

The Court: That is the way to do it.

A. (Examining) I couldn't testify, Mr. McKeever, without examining my files whether I got that reply or not. It seems entirely possible, but I don't remember the circumstances.

X Q. Well, you remember exchanging cablegrams with reference to Koch's activities in selling your Cross cracker to deGanahl in February, 1925?

A. I remember some exchange, and I would say I remember the wire you read before because I assisted in composing it, but I don't remember the reply, no, sir.

X Q. You wouldn't want to say that was a correct copy of the reply, or you wouldn't want to either affirm or deny?

A. I couldn't.

The Court: If he can find the originals in his office, why, he can verify his impression.

Mr. McKeever: I hand the Reporter an instrument, which I now ask to have marked and identified as Defendant's Exhibit 66.

(Document marked Defendant's Exhibit No. 66.)

[fol. 397] X Q. I hand that to the witness and ask him to read the same and state whether or not that is a copy of

a letter that he directed to Mr. deGanahl with reference to Mr. Koch's activities on or about the 9th of February, 1926?

A. I should say so. I would have to compare it with my file to be sure that it was textually accurate, but substantially I should say it was a letter that I wrote—probably the same, but it is not identically a copy, and I would have to check it. Substantially I should say it was.

Mr. McKeever: I now offer the exhibit in evidence.

Mr. Marsh: No objection.

(Defendant's Exhibit No. 66 admitted.)

Mr. McKeever: I desire to read it to the jury (reading):

"Copy

Gasoline Products Company, Incorporated, 52 Broadway, New York

February 9, 1926.

Chas. F. deGanahl, Esq., c/o Medway Oil & Storage Company, Limited, Grain Halt, Isle of Grain, Kent, England.

DEAR MR. DEGANAHL: We have received this morning your cable replying to ours in regard to Mr. Koch's efforts to solicit business in Cross Cracking plants to be sublicensed under your license agreement of April 7, 1923, and are at a loss to understand your attitude and your failure to realize that we consider Koch's efforts very much in the light of a direct attack upon us and the business structure which we have been at such pains to build.

As you well know, some two years ago we entered into an arrangement with the M. W. Kellogg Company under [fol. 398] which they have since acted as our sales engineering and construction departments. Regardless of what your personal opinion may be of this arrangement, it is our opinion, proved by two years' experience and over 100,000 barrels of new capacity installed or under construction, that the relationship thus established and the complete rounding out of our organization thus accomplished have been fundamental to the development of our business and are today prerequisite to its continued success.

Prior to the completion of our organization on the basis above outlined it was our universal experience with all licensees that the construction of units was interminably delayed, that the skill employed in construction was such that the initial operation of each unit involved a trial period of thirty to ninety days filled with minor accidents, shutdowns, etc., and that the materials employed were not always according to our specifications in spite of the most rigid inspection service. As you will well realize, the continued growth of our business is largely dependent upon the satisfactory operation of existing installations and the good will of their owners. No matter how many explanations can be offered defects such as those mentioned will always be obvious to all who are interested in cracking and furnish a strong point of sales resistance with prospective customers and a ready weapon to the hand of our competitors.

Since we have joined the Kellogg Company to our organization the construction time has been cut to a known standard determinable in advance in regard to each installation. Every unit constructed has made a perfect run when first put on stream, and the materials and workmanship employed have been of such a high order as to excite the admiration of our earlier licensees who are all too familiar with the handicaps under which their plants were constructed.

Had you yourself been present in this country during the past two years and familiar with existing conditions in our [fol. 399] business you would be the first to confirm and approve every statement that I have made.

In your reply to our cable you seem to have overlooked our conclusion that Koch's efforts might be damaging to our business and you make the assumption that our sole desire is to arrange the installation of more units. The aim of our business is naturally to secure the widest possible use of the Cross Process. To put our feeling in the most definite terms, let me state without any reflection on Mr. Koch or his ability, that in view of all the circumstances any installation made under his supervision would be prejudicial to that aim and any effort on his part to solicit such business would be equally prejudicial.

We are very much surprised that you should have made this suggestion without consulting us as we have always

endeavoured to coöperate most fully with you and had considered that if we could feel a closer relationship and a more friendly mutuality of interest with one licensee than another than that licensee would be yourself. It has come as a shock to us to find strong indications leading in our judgment to the belief that such is not the case. We can only hope that the circumstance had arisen through your lack of familiarity with conditions on this side of the water, possibly natural to, and inherent in, the distance and time that have separated us. We have written fully and frankly in the confident belief that once you understand the premises that lead to our conclusion you will concur in our opinion and promptly advise us that the effort will be discontinued at once.

In conclusion we can only add that should you desire to arrange installations under your license in this country we will be glad to coöperate in any way that is not detrimental to your own interest. Replying specifically to the request in your cable, we can further add that no licenses have been issued which would entitle you to a reduction in royalty rate under clause twelfth of your contract. Our regular [fol. 400] terms are and continue to be 10c per barrel throughput or the alternative lump sum payments set forth in our letter to you of January 16, 1926.

May we ask that you cable us promptly upon receipt of this letter?

With kindest regards,

Very truly yours, (Sgd) C. H. Welling, Vice President."

Mr. McKeever: I hand the Reporter an instrument which I ask him to mark and identify as Defendant's Exhibit No. 67.

(Document marked Defendant's Exhibit No. 67.)

Q. Mr. Welling, I hand you now Defendant's Exhibit No. 67, and ask you if that is a copy of a letter received by you from Mr. deGanahl in reply to the one I have just read to the jury?

The Court: Mr. McKeever, did you read the reply to the first cable you read?

Mr. McKeever: I did not.

The Court: Didn't desire to?

Mr. McKeever: I did desire to, but he would not admit that he received it.

The Court: He said so far as he could tell, on account of the lapse of time, it was the same.

Mr. McKeever: I thought he was trying to qualify it to the degree that it would destroy my right to offer it, so I did not offer it.

The Court: As long as you have got in the original of it, you ought to put in the reply.

Mr. McKeever: I will be glad to. That is what I wanted. Will you admit, Mr. Marsh, now, that the reply——

Mr. Marsh: I won't make any admission at all. I think you can read the reply to him and ask him if he remembers receiving it, and, if he does, I have no objection.

[fol. 401] The Court: He said as much in relation to the reply as he did in regard to the original anyway. If that is admissible, the reply is admissible.

Mr. McKeever: I didn't so understand, if Your Honor please, but he might have.

The Court: I would suggest that you put these in, and, if Mr. Welling finds from his files that there are any errors in them, he can have them corrected by counsel.

Mr. Marsh: He obviously can't say whether they are copies or not—four pages long.

The Court: Of course he can't in this length of time—to-day.

Mr. McKeever: There is no objection to a comparison with the orginals, nor to any correction, if error has occurred.

The Court: The question was, whether that, in your opinion, was substantially a correct copy of the letter?

A. With the same reservation as to its accuracy, yes, Your Honor.

Mr. Hale: We object, on the ground that we do not understand the relevancy of the letter. It is a long letter that——

Mr. McKeever: I think counsel should have a chance to read it over. It is of some length. I am satisfied that both of them will be able to comprehend the relevancy of it after they read it.

I would like to hand Mr. Welling another letter that he may be reading. (Hands letter to witness.)

Mr. Marsh: Our objection to it is simply that it has no relevancy to the issue in this case that I know of. It is dated February 24, 1926. If counsel will state in what connection he is offering it——

Mr. McKeever: My theory of it is that it is a reply to the one who have just read, and it is a discussion of the matter of Koch's activity in selling this plant to Champlin.

The Court: You have gone so far into it that I think you might as well finish it.

Mr. McKeever: It goes to the question of rates and the correctness of Mr. Welling's statement with reference to the royalties.

[fol. 402] The Court: Go ahead.

Mr. McKeever (reading "Defendant's Exhibit 67"):

"C. H. Welling, Esq., Vice President, Gasoline Products Company, Inc., 52 Broadway, New York.

MY DEAR MR. WELLING: I have to acknowledge your letter of February 9th. I am utterly at a loss to see how you can construe the fact that I am trying to place a sublicense contract under the license that I hold from you, to be in the slightest degree a direct attack upon you. Certainly nothing is further from my thought. I bought from you a certain license agreement with the right to sublicense, have complied with my obligations in that agreement, and spent about two million dollars in building a refinery to do so, which, incidentally, has been an exhibit plant for a number of scores of your prospective clients none of which I have approached in the least degree. Time is running on and I feel that I wish to get some remuneration out of the contract that I have with you.

When I received your message of February 7th I gathered therefrom that your complaint was that Mr. Koch, with whom I am coöperating in this matter, was quoting a much lesser rate to clients than you were. Your message read as follows:

'Fred Koch soliciting midcontinent refiners sublicense under your contract at six cents instead of nine cents as provided in contract and as against ten cents we offer stop We will of course coöperate should you desire construct or sublicense plant this country but feel Koch's present efforts prejudicial our efforts secure business particularly as he

seems misinformed quoting six cents royalty rather than nine cents stop If you desire arrange sublicense your American rights suggest you advise us basis on which offers can be made stop We will assist in any way possible but request you realize present situation unfortunate not promotive your interests and possibly damaging to ours best regards.'

[fol. 403] To this I replied as below:

'Koch quotation surely misapprehension expect pay you per contract stop Cooperating Koch American units do not believe sublicense contemplated under ten cents please cable if you have made any reductions which entitle me to reductions under clause twelfth stop Every wish work harmoniously and presume you are glad to have more units in operation Best wishes all.'

Mr. Koch informs me that there is absolutely no truth in the intimation that he had been quoting at the price you intimate. As a matter of course I realize that my rate is 9c a barrel in America which leaves me the slender margin of 1c a barrel on your own rates. Surely this is little enough and it would be absurd for me to allow the quotation of a lesser rate than 10c a barrel which was never contemplated.

With reference to your second paragraph. I generally know that you had some arrangement with the Kellogg Company. I was under the impression it was a marginal arrangement on sublicenses or division on licenses. I have no opinion whatever on this arrangement and do not question for a moment that you have found it a good one, but I cannot see how this bears in any way on my license agreement, and why you should infer that it is.

With reference to your third paragraph. I quite realize that the continued growth of your business is largely dependent upon the satisfactory operation of existing installations and the good will of their owners. I also realize that there may be cases where you might not be able to point with pride to some of the installations, but I distinctly resent any inference that this could be the case with me. We have built a large refinery here, made many improvements thereon, always advised you of them, have boosted the Cross unit in every possible way, and gladly allowed you to use it for exhibition to your clients at all hours

[fol. 404] and in any numbers, even to the extent of giving your people and their guests freedom to other parts of our refinery which in no sense were we contracted to do. This condition is still going on, and nothwithstanding the fact that the Kellogg Company have built a refinery under your patents at Cory Brothers you continue to bring your people to Medway, our refinery, when one would suppose if the construction of the Kellogg Company was so very superior to ours, you would have chosen this better plant for the purpose. We have even supplied you with material that you were short of on the Cory plant, while, when we were short of tubes some six or eight months since, notwithstanding the large number of refineries that you were building in America, I was unable to secure any assistance whatever from your good selves or from the Kellogg Company, and was compelled to wait until an entirely new set of tubes was manufactured for me.

I gather from your present letter, but I did not know it before though had suspected it, that you are in partnership with the Kellogg Company on construction work. Why on earth you expect me to submerge my interests because you have seen fit to make such an arrangement, I find difficulty in realizing. I can readily understand that Mr. Koch in representing my interests for sub-leases, might be considered as a competitor of the Kellogg Company, but please tell me how it would be possible for me to gather fruits from the contract I have made without competition being created? If you wish to infer that Mr. Koch's engineering, insofar as it pertains to putting into execution the principles of the Cross unit, is not up to that of the Kellogg Company, you will pardon me if I have my own opinion. Mr. Koch worked for me for something like a year, and I state without hesitation that I regard his advice and engineering ability on matters pertaining to the cracking and fractionation of oils as being unsurpassed by any engineering concern of my acquaintance, and I consider that I would be perfectly safe in following his advice. [fol. 405] You express surprise that I should have endeavored to secure a sublicense without consulting you. Please, Mr. Welling, consider the matter a moment and ask yourself what obligation I have or what reason I have for doing so. It is perfectly true that our relationship has

always been friendly and I sincerely hope that this may continue, and I also hoped at one time that we would be able to work with the Kellogg Company on the expansion of this plant, but as time went on the impression was forced upon me that I could only do so by paying a very heavy premium which, pardon my frankness, I feel perfectly sure we could do better and much cheaper ourselves.

My familiarity with conditions on that side of the water may not be as meagre as you suppose, but even were it so, why should I not endeavor to sublease my rights there? You have written fully and frankly, and I am glad to have your frankness, and the only conclusion that I can come to from it is that you simply wish me to stand by quietly and allow my license to expire without in any way seeking a return therefrom. In conclusion you say that if I desire to arrange for installations under my license in America you will be glad to cooperate in any way that is not detrimental to your interest. We appreciate this kindliness on your part, but the statement is definitely qualified by what you might consider detrimental to your interest. Certainly my interests are in getting what license agreements I can, and in the construction of such plants as I may be able to do at a profit, and if this is detrimental to your interest I can only say that I am sorry, but do not think you can reasonably ask me to submerge my efforts. You receive the contract royalties on such plants as I may secure.

I am glad to have you tell me that no royalty rates have been made at a lesser rate than that provided for in my contract. I had suspected otherwise but with your assur- [fol. 406] ance now feel at ease in this respect. However, I had requested you to cable me in regard to this.

In conclusion I can only say that I regret extremely the view that you take and think that your views are not reasonable, and earnestly hope when you have weighed the matter carefully, you will see the justice of my position. I am not answering this by cable as there is nothing that I can add by cable to what I have already wired you.

With kind regards, I am,

Very truly yours, Chas. F. deGanahl.

P. S. May I also inquire, and would you mind furnishing me with a list of such improvements as you have made

in the Cross unit since the date of my license. I should like them in sufficient detail to enable me to intelligently apply them should we deem it wise to do so."

Mr. Marsh: I move that be stricken out. It appears on the face of it that it is utterly irrelevant to this trial or any issue in this trial.

The Court: I can't see the relevancy, but so long as the other part of the correspondence went in without objection I think this ought to go in, as it is the answer.

Mr. Marsh: I would like to save an exception if I may?

The Court: Very well.

(Exception noted for plaintiff.)

Mr. McKeever: With reference to reading the reply cablegram, it was incorporated in the answer I read, and therefore I do not desire to read that.

Mr. McKeever: I hand the reporter an instrument I desire to have identified as "Defendant's Exhibit 68."

(Paper marked "Defendant's Exhibit 68.")

X Q. Mr. Welling, you hace read and examined "Defendant's — 68." I will ask you if you received,—if that is [fol. 407] a copy of the letter you received from Mr. de Ganahl on or about February 19, 1926; the latter part of said month?

A. With the same reservation as to the text. This is a copy and it is two years ago, and I haven't consulted my file.

Mr. Marsh: Did you ask him if this was the date he received it?

Mr. McKeever: I said in the latter part of February.

The Court: He answered the same as the others. So far as he can tell he apparently did. He is not certain as he has not compared it.

Mr. McKeever: I have no objection to his correcting any errors in this.

The Court: Well, let's see——

Mr. Marsh: We object to that, Your Honor.

The Court: I presume it is the same one?

Mr. McKeever: No; it has a little different significance, it goes, however, to the testimony.

(Conference at bench between Court and Counsel.)

Mr. McKeever: I will withdraw offering the Exhibit No. 68 at present.

(Defendant's Exhibit No. 68 withdrawn.)

Q. Now, referring to the letter you have read, for the purpose of refreshing your recollection, I want to ask you about it——

The Court: Has he read the letter?
The Witness: Yes, sir.

Mr. McKeever: Yes. He has read it.

Q. (continued) and I will ask you if, along about the time this letter was written——

The Court: What time was that? What date was that?

Q. (continued). In February, 1926; the twenty-third, it is dated, and just prior thereto, if there wasn't litigation filed against your company, the Gasoline Products Company, and the Kellogg Company, in New York, charging an infringement of patent?

[fol. 408] A. Yes. About that time, I should say. I am a little vague as to the dates, on that.

The Court: Which patent?
Mr. McKeever: The Cross patent.

Q. I understood you to say, yesterday, in connection with this litigation, that it didn't involve patents; and you were referring to certain litigation down in Indiana, weren't you?

A. I don't know what litigation you refer to. I didn't refer to this litigation?

Q. Well, maybe it was Mr. Harvison who referred to the litigation. I will ask you, directly, now, if at this time—February—and at the time you were negotiating with Mr. Champlin, if these suits weren't pending in New York involving the patent on the Cross cracking units owned by your company?

Mr. Marsh: I object. He refers to these suits—What was that question?

The Court: Read the last part of that question.

(Last part of pending question read by reporter.)

The Court: This gentlemen knows what a patent suit is.

A. The Universal Oil Products Company had brought a suit in the New York jurisdiction charging infringement on the patent. Yes, sir. I think it was pending at that time.

Q. And what was the name of the plaintiff company?

A. The Universal Oil Products Company. The Dubbs process.

Q. And they were the owner of the patent on the Dubbs process?

A. Yes.

Q. Of the patent rights?

A. Yes.

The Court: Is that a cracking process?

A. Yes, sir.

Q. In point of installation numbers, in 1926, the Dubbs process was ahead of all of you, wasn't it?

A. I shouldn't say so. No. Not to my recollection.

Q. Well, it was a strong competitor, anyway, wasn't it?

A. It was the leading competitor.

[fol. 409] Q. Yes. Mr. Welling, that case was never tried, was it?

A. Which one was that? The one we were just speaking of?

Q. Yes. Down in New York?

A. I don't think it has come to trial yet.

Q. Well, you and the Universal—what was the name of that company?

A. Oil Products.

Q. (continued). Oil Products Company—owning the Dubbs patent—and the other patent holders of these different processes, organized what you called the Patent Club, and suspended all that litigation, didn't you?

A. No, sir.

Q. You did organize the Patent Club?

The Court: The what?

Mr. McKeever: Patent Club.

A. It didn't have any connection with the Universal Oil Products Company.

Q. Didn't they belong to that?

A. I don't know just what you mean, exactly, by the Patent Club.

Q. Well, that is the way I described it. I will ask you if you didn't organize, if you didn't form an organization with the other patent holders of these cracking processes for your mutual protection?

A. No, sir.

Q. There was such an organization formed?

A. No, sir. Not that I know of.

Q. Does that exhibit to the license agreement, enumerating these holders of patents, have anything to do with what I am asking you, in reference to that organization?

A. We have agreements with those companies.

Q. But the plaintiff company in the suit which we have mentioned, and which suit is still pending, isn't a party to that agreement?

A. They are not a party to any agreement that we are a party to.

Q. All right. I wanted to find out, that was all. That has been three years ago?

A. What is that?

Q. That this suit was brought—or more—by the Dubbs people against your people, on the infringement over these [fol. 410] patents? Now you say that litigation hasn't been finished yet?

A. I couldn't fix the date, except by reference to the letter you have shown me or by my files—my own files; that would place it late in 1925 or early in 1926.

Q. And the suit is still pending?

A. Yes.

Q. Without any agreement on your part—on the part of your people—with the plaintiff company to suspend that litigation?

A. None whatever, that I know of.

Q. None whatever that you know of?

A. No, sir.

Mr. McKeever: I would like to have the declaration.

The Court: Have you a copy of it?

Mr. Hale: We have one that is in the record here.

The Court: Yes. It is in the record.

(Copy of record produced and handed to Mr. McKeever.)

The Court: There is probably an index there.

Mr. McKeever: I think I can turn to it, Judge.

Mr. Hale: Page 44.

The Court: 44, he says.

Mr. McKeever: 44? Not 44.

Mr. Hale: What is it you are looking for?

Mr. McKeever: I want the copy of the contract that you brought this suit on. I have found it now, Judge. I knew I could find it in a minute, but by trying to hurry along it takes me longer than it otherwise would.

Q. Now, Mr. Welling, the contract on which your suit is based here—what we have termed for the convenience of things, the license agreement—that is a contract substantially in form and conditions as all of your license agreement contracts, isn't it?

A. No, sir. I wouldn't say so. There are some differences, so that you couldn't call it substantially the same.

Q. Do you vary the terms in a contract—so far as conditions are concerned now—do you make a different condition for one licensee than you do the other?

Mr. Hale: I object to that line of inquiry.

[fol. 411] The Court: I don't see the materiality of it. Of course the question is here as to this contract. Not what he varied with other people.

(Conference at bench between Court and Counsel.)

Mr. Hale: We will make the objection for the record later.

XQ. Mr. Welling, without reading it, you are familiar with the ninth paragraph in the license agreement with the Champlin people, aren't you?

A. I would like to look at it.

The Court: You have really started again your question?

The Reporter: The last question was, do you vary the terms in a contract—so far as conditions are concerned now—do you make a different condition for one licensee than you do the other?

Mr. McKeever: I will withdraw that and start a new question.

Mr. Hale: It was withdrawn. (Question read as follows):

Mr. Welling, without reading it, you are familiar with the ninth paragraph in the license agreement with the Champlin people, aren't you?

A. I have read it; yes, sir. I am familiar with it.

X Q. Was that agreement contained in the other license contracts of your licensees——

Mr. Hale: Your Honor please——

Mr. McKeever (continuing): Made prior to the Champlin License?

Mr. Hale: Just a minute. That question we object to.

The Court: I will admit that subject to your objection.

Mr. Hale: Subject to our exception.

A. I should say substantially the most of it was and some of it not substantially that language. The form may have been varied.

X Q. I mean the substance of it. I am about through with this witness now, Judge.

The Court: Take what time you think necessary.

Mr. McKeever: I don't want to make the Court nervous or anybody else.

[fol. 412] The Court: Oh, no, we are not getting nervous. You are going to have a rest all over Sunday.

Mr. McKeever: I thought there were certain places where I evidenced some little nervousness, and it makes me also nervous perhaps.

X Q. Now I undestood your contention yesterday and your statement of the fact to be that you told Champlin you were giving him the vapor phase system treating tower, royalty free, for the sole and only purpose of getting a first installation as an experimental plant on one tower?

A. May I have that read again? Who is "we"—the Gasoline Products or the Cross Development?

X Q. Yes, the Gasoline Products.

A. The Gasoline Products Company?

X Q. Well, in order to save that argument at this time I mean whoever was to give it? Just leave out whoever was to give it to him. Then the rest of the question.

A. The Cross Development was going to give him a free license for the sake of getting a free tower. The Gasoline

Products was going to advance the cost of that experimental tower because they believed the development of such a process would stimulate their sale of cracking, that different process.

X Q. Now your correspondence—the letter of August the 2nd that is in evidence here, you called attention back to this visit you made to Champlin in the latter part of January. Now in your testimony yesterday you said that you advised Champlin to take this one tower which was to be—no matter who was to do it—installed royalty free, and if it didn't work he didn't have to pay for it. He would try that out. Then he could instal the other two at his own expenses. That is what you said, isn't it, in substance.

A. I offered that to him. I don't remember advising him to take it. I offered it to him; yes, sir.

X Q. That is just as good. You made the offer to him?

A. Yes, sir.

X Q. Now did you expect him to permit you, whomever you were representing, to instal one tower and make the [fol. 413] physical construction and have these cracking units operating whereby he would only have one-half of his output of the cracking units taken care of until you got through with an experiment, and then advised him to buy a couple of more towers, and by that means cut down his plant, as you say it takes two months, and as Mr. Slater says, six?

Mr. Hale: He has asked about fourteen questions.

The Court: I will hear that question read. You see it cannot be a proper question. You are arguing with him. You are not asking a question.

Mr. McKeever: Well, maybe I am.

The Court: You can defer all those arguments until later and ask him the questions which may develop the basis for your arguments.

Mr. McKeever: That is what I am doing. I am repeating what he said yesterday. Then I want the conclusion on it. I am only calling his attention——

The Court: Read that question and you listen to it.

X Q. Well, I will withdraw it, because we are going to have an argument about it and fix it another way. You advised him to put in one treater and try it, didn't you?

A. No, sir.

X Q. Did you say that yesterday?

A. I offered him one treater.

X Q. All right, offered him one treater then.

A. Yes.

X Q. To try?

A. Yes.

X Q. And I will ask you if you didn't state in your testimony after that was tried then he could put in two more?

A. Yes, sir.

X Q. Now that would entail an idleness of half his cracking capacity, wouldn't it, until he got them in?

A. No, sir; not as I understand it. As I understand it, it was perfectly simple for him to treat by conventional methods any surplus until he got the balance of his equipment in shape.

X Q. Oh, you wanted him to treat by the conventional method, that was your idea?

A. With my limited knowledge of technical subjects, I [fol. 414] understand that to be perfectly possible. That is the way I understood it at that time, and still do.

X Q. Did you make any inquiries as to whether he had any equipment there to treat the other half of the cracking capacity by conventional methods?

A. No, sir.

X Q. Now I call your attention to your letter of August the 6th—August the 2nd, 1926, which is offered in the evidence here, and ask you if you didn't say in that letter that you suggested the installation instead of offered it?

A. I guess I did. I suggested and offered probably; yes, sir.

X Q. Well, why—no, argumentative. You also advised him that it would be useless to build three towers till one was tried out?

A. I though that would be an unnecessary expense.

X Q. No, wait a minute.

A. I told him in my opinion it would be unnecessary to.

X Q. Yes. Was Schofield your attorney at that time on these patent matters?

A. One of them; yes, sir.

X Q. You follow the advice of your lawyers, do you? Did you then?

A. Yes, sir.

X Q. So, when Schofield told you that the Cross—the Gray patent—the Cross vapor phase patent was no infringement on Gray, you believed that, did you?

Mr. Marsh: The debate is being continued. I think that assumes an opinion that Mr. Welling has not testified was given to him.

Mr. McKeever: I will withdraw the part of the question where I say "believed it." I will ask you if you relied on it?

The Court: He said he did once before.

Mr. McKeever: That was on direct examination, perhaps.

The Court: You may ask it.

X Q. I ask you if you relied on it?

Mr. Marsh: Relied on what?

Mr. McKeever: On Mr. Schofield's opinion at that time?

A. Yes, sir.

The Court: On that point. He said he did.

[fol. 415] Mr. Marsh: Your Honor, I move to have those last three questions and answers struck out, because the first question had an argumentative statement as to what Mr. Schofield's opinion was, and the answer that was asked for was, Did you rely on that opinion. Now Mr. Welling had never testified—has never testified in this suit as to the nature of Mr. Schofield's opinion except in answer to one question that was asked yesterday. Was the decision for Gray or for Cross.

The Court: Was against Gray or for him.

Mr. Marsh: Yes.

The Court: I know, but I think we will leave that in.

Mr. Marsh: May I have an exception?

The Court: Yes.

X Q. Mr. Schofield that I mention that you refer to is the Mr. Schofield over at the end of the table, who is counsel for you in this case, isn't he, one of them?

A. I suppose he is. I don't know whether he is counsel in the case. I thought Mr. Marsh and Mr. Hale. Schofield was in also.

X Q. Did Mr. Schofield help try it before?

A. I wasn't here. I don't know, sir.

X Q. You don't know?

Mr. Marsh: We will stipulate that he did.

X Q. Now with reference to the communications that Mr. Marsh asked you between you and Mr. Champlin, in order to have that clear in the jury's mind, after your visit to Enid then the only communications passed between your company and the Champlin Refining Company was between you and Mr. Champlin as individuals were the communications which we have offered in evidence in this case?

A. Correct. I think they are all in. I am quite sure they are.

X Q. Now how did you learn the day you were at Enid when you and Keith went to see Champlin, that Mr. Koch had been there soliciting him for the selling the cracking units?

A. I saw Mr. Koch in town, and either Mr. Champlin or [fol. 416] Mr. Slater said that Mr. Koch had suggested they take a sub-license, that he would be able to procure for them.

X Q. As I understand this process of vapor phase treating, the Cross process was like the Gray process except the Cross added the copper to the clay. Is that your understanding?

A. I couldn't testify as to that, sir. It is too technical for me, and I didn't have any understanding at that time exactly how the process would function.

X Q. You never offered to add the copper to any of the Gray processes that were using the clay, did you, to make your experiment? Did you ever try that?

A. I never tried it. I never heard of such a trial being made; no, sir.

X Q. Now, Mr. Welling, what time of the day was it that you were in Enid on that occasion when you got in there?

A. I arrived there about three o'clock in the morning, very early in the morning before daylight.

X Q. You came up on that train from Dallas?

A. Some train from Dallas.

X Q. That early train?

A. Yes, sir.

X Q. What time did you go to Mr. Champlin's office?

A. I don't remember. I should say through the morning. It might have been after lunch.

X Q. What time did you leave there that day?

A. I took the train North sometime after supper in the evening, I should say around nine or later.

X Q. Do you say Champlin took you out to the refinery?

A. Yes.

X Q. What time of the day was that?

A. That was when I called on him in the office. We went right out.

X Q. I understood you to say that you called on him before lunch?

A. I couldn't say whether it was morning or afternoon. We made a call on him in his office, went right out to the refinery, and spent an hour or two talking, and he brought us back to the hotel.

[fol. 417] X Q. Where did you see Mr. Koch?

A. Saw him around the hotel on the street in front of the hotel.

X Q. Did you know him, previously?

A. Yes, sir.

Mr. McKeever: That is all, if Your Honor please.

Redirect examination.

By Mr. Marsh:

Q. Now, first, to clear up that matter that Mr. Harvison wished to have cleared up, Mr. Welling, I show you, to refresh your recollection, a statement furnished by your office as to the stockholders of the Cross Development Corporation in January and February, 1926, and ask you whether you will state the number of shares of stock in the corporation outstanding on that date?

A. 300 shares.

Q. Now will you state the number of shares of stock held by the M. W. Kellogg Company on that date?

A. 18 shares.

Mr. Marsh: Thank you.

The Court: Par value of $100?

The Witness: I forget. I think no par value. I am not sure.

Q. Wasn't it a fact, Mr. Welling, that the stock was of no par value but that the subscriptions were at $100 a share?

A. Yes, sir, that would be it.

Q. Now in your testimony yesterday with reference to Cross Engineering Company you stated that Gasoline Products Company had no business relations with Cross Engineering Company. Now will you state whether you have refreshed your recollection as to some transactions that you did have between Gasoline Products Company and Cross Engineering Company, and, if so, state what they were?

A. I have, and they did. They did do some engineering work for us, designing and drafting and so forth.

Q. What was the nature of that designing and drafting, if you remember?

A. Of the experimental equipment, as I remember it, of our cracking plant, particularly with reference to an installation we were making at Blackwell, Oklahoma, to test cer-
[fol. 418] tain types of distillation apparatus. I have forgotten just what, but I remember we did have a certain amount of designing and drafting which we had them do for us.

Q. Can you state approximately what the total amount was that you paid them for these services?

A. Between six and ten thousand dollars, I should say. Probably not less than the smaller amount; certainly not more than the larger, over a period of six or eight months.

Q. You had overlooked that yesterday, had you not?

A. I overlooked that yesterday, yes, sir.

Q. Now on page 532 of the transcript of yesterday's testimony the following question by Mr. McKeever appears:

"XQ. Then I misunderstood you when you answered, when I made my notation. What was your connection with other companies when you made your answer?"

That was in connection with the license agreement and the Standard Oil of New Jersey and Standard Oil of Indiana, and the Texas Company, which was referred to. The answer reads:

"A. The right to issue licenses to other processes under their patents."

Will you state whether that was correct?

A. No, sir; my answer was "The right to issue licenses to our process under their patents."

The Court: The word "other" should be "our." That is easily mistaken.

Mr. McKeever: We have no objection to that. I think that is true.

The Court: That is easily mistaken. Why don't you correct that in your copies.

By Mr. Marsh:

Q. On page 535, when you were being questioned by Mr. McKeever with reference to holding the office of vice president of the Cross Development Corporation, His Honor asked a question. The transcript shows the question as follows:

[fol. 419] "By the Court:

"X Q. Do your by-laws provide for one vice president?"

And your answer was:

"A. As I recall it, they do."

My recollection is that His Honor asked, "Do your by-laws provide for more than one vice president?"

The Court: That is what I thought my question was?

Mr. McKeever: That is correct.

The Court: Make that change.

Mr. Marsh: We will have the by-laws here on Monday so that we can put them in. If these little matters are not corrected at the time, they become overlooked.

Q. Now, Mr. Welling, Mr. McKeever has put in, as Defendant's Exhibit 65, what appears to be another copy of the letter of January 9, 1926, from yourself to Mr. Keith. I will ask you to compare those (handing papers to witness) and state what if any relationship there is between the two copies?

Mr. McKeever: Now, if the Court please, I object to that unless the witness states he knows, because they are the best evidence of their own relationship.

By Mr. Marsh:

Q. Well, I will call your attention to the date?

The Court: Isn't this something that is manifest from inspection?

Mr. Marsh: It seems so to me, sir.

The Court: It is just as much manifest to the jury as it is to him, isn't it?

Mr. McKeever: That is the view I take of it, so I didn't bother the witness with any conclusions concerning the matter.

The Court: I think the jury's opinion is just as good as the witness's or mine.

Mr. McKeever: I think it would be better.

The Court: No doubt.

Mr. McKeever: Because the rest of us might be prejudiced.

[fol. 420] By Mr. Marsh:

Q. Mr. Welling, on your direct examination, page 511 of the Transcript, after your stating that you gave Mr. Keith a letter which would cover the terms:

"Q. Have you a copy of the letter with you?

A. I have. (Witness produces same.)

The Court: This refers simply to the vapor phase treating?

Mr. Marsh: Yes, Your Honor.

Q. Will you state the date of the letter?

A. January 9, 1926.

Q. To whom was it directed?

A. P. C. Keith, Esq."

Then after the letter was read there was a question:

"Q. Did you sign and deliver such a letter to Mr. Keith?

A. I did.

Q. January 9, 1926?

A. I did.

The Court: The record will show that it was signed by him—by Mr. Welling.".

Mr. Welling, when you answered those questions, did you understand that I was asking you or that you were answer-

ing that that was your file carbon of the letter, or simply a copy made therefrom?

Mr. McKeever: We object to the question.

Mr. Marsh: I don't see how you can.

Mr. McKeever: For the reason I wouldn't want Counsel to try to claim now that he produced other than the proper carbon copy of the original.

Mr. Marsh: I didn't make any claim as to that at all.

Mr. McKeever: You offered it as evidence in this case.

Mr. Marsh: Here is what I said "Have you a copy of the letter with you?"

Mr. McKeever: You knew that I relied on it or was relying on it as a copy of the original.

Mr. Marsh: I had no such understanding at all.

The Court: Do you want to correct that testimony in any way?

[fol. 421] Mr. Marsh: I don't think he needs to, but I want him to state what he had in his mind when he answered that was a copy.

Mr. McKeever: I object. He has already expressed it. If he doesn't want to correct it, it stands.

The Court: I wouldn't go into it. I don't think it is of enough importance.

By Mr. Marsh:

Q. I will ask you, Mr. Welling, was either of these exhibits, Plaintiff's Exhibit No. F or Defendant's Exhibit No. 65, your original file copy of the outgoing letter?

A. I cannot testify to that. They are both accurate copies.

Mr. Marsh: It appears that No. 65 is the ribbon copy.

Mr. McKeever: Wait a minute.

The Court: He says he can't tell.

Mr. McKeever: If the Court please, I object now to the answer of the witness, stating that they are both accurate copies, because it is not the best evidence.

The Court: If he knows they are accurate copies, he may say so, and has said so.

Mr. McKeever: If Your Honor please, as I understand the rule of evidence, that would not be the way to prove a copy.

The Court: They all have been admitted. You don't have to prove them any more.

Mr. McKeever: As I suggested to the Court, they were admitted, however, yesterday, as the Court may well now see, under the belief of his testimony that it was a copy of the original letter; and, of course we thought—I don't believe he did use the word "carbon," but that is what I thought about it.

The Court: I think you better leave the matter right there. I think you both are magnifying the importanee of it. I see no object in changing my ruling or in changing the situation. Leave it right there where it is.

Mr. McKeever: I have no desire to bring out anything but the facts.

The Court: Of course not.

Mr. McKeever: Whatever they are, I want them developed.

[fol. 422] By Mr. Marsh:

Q. Now, Mr. Welling, in Defendant's Exhibit No. 66, as I recollect it when it was read in evidence, there was a statement in which you referred to the Kellogg Company as "our engineering and construction department." Will you state whether that term was intended by you to convey the impression that they were a part of your business?

Mr. McKeever: If the Court please, I object to that.

The Court: He may explain what he meant by the answer.

Mr. Marsh: You put this in. I think it is fair to let him explain it.

The Court: He may explain what he meant by that language.

Mr. McKeever: Perhaps he has a right to.

A. No, sir, not that they were part of our organization, but that they were a separate organization that functioned for that purpose.

Mr. McKeever: If Your Honor please, explaining myself, I do not want it to be understood that his connection with Kellogg, so far as the connection of the company, was any different from what he said yesterday.

The Court: He has a right to clarify his answer, if it is ambiguous.

By Mr. Marsh:

Q. Now, in Defendant's Exhibit 68, or the letter which was marked Defendant's Exhibit 68, there was a reference to a suit commenced by the Universal Oil Products Company against Kellogg Gasoline Products, and Mr. McKeever asked you about the patent club, and then asked you whether the Universal Oil Products was not part of what he called the patent club. I will ask you to state, Mr. Welling, the litigation of which you have present knowledge between the Universal Oil Products Company and any of the companies who own the patents listed in your license agreement, that is, the Texas Company, the Standard Oil Company of Indiana, the Standard Oil Company of New Jersey—I think those are the three? Do you know of any litigation now pending?

A. The Universal Oil Products Company is suing all three of those companies, at least once, but suing them or their [fol. 423] licensees. It is suing the Indiana Company and has been for a great many years, and I think recently has filed a separate suit against one of the Indiana Company's licensees, and suing the Warner Quinlan Company, a licensee of the Texas Company.

Q. Will you state whether there is now any litigation pending between the Gasoline Products Company and the Dubbs Company other than this quiescent suit up in New York?

A. No, sir.

Q. Will you state whether there is any patent office litigation?

A. There is. There are two or three very important interference proceedings pending in the Patent Office between applications for patents that have been filed on our behalf and others that have been filed in their behalf.

Q. Will you state whether or not that litigation is being actively prosecuted by your company and the Universal Oil Products Company?

A. Prosecuted with intense activity and at tremendous expense.

Q. Your relationship to the Dubbs is that of an active and bitter competitor, is it not?

A. Yes, sir. Both commercially and in the Patent Office.

Mr. McKeever: That is conceded, if Your Honor pleases.

By Mr. Marsh:

Q. Mr. McKeever asked you about the question of treating apparatus in connection with the installation of Cross cracking units. Will you please enumerate the instances, if any, in which the treating apparatus was even considered in connection with the installation of Cross cracking units; that is, considered by your company?

Mr. McKeever: You mean in connection with other installations than the one in question?

Mr. Marsh: I certainly do.

Mr. McKeever: I object to that as immaterial.

The Court: I can't quite see how that is material.

By Mr. Marsh:

Q. Will you state whether the Gasoline Products Company in connection with licensing cracking units offers or recommends any type of treating process to prospective licensees?

[fol. 424] Mr. McKeever: I object to that for the same reason.

The Court: The issue is whether they did it upon this occasion.

Mr. Marsh: But the inference raised by my brother was that that was part of their regular procedure, and I want to prove that it was not.

The Court: There is something in that.

Mr. McKeever: What was that statement.

The Court: He thinks that your testimony went toward the point showing that it was part of their regular procedure to offer some method of treating the gasoline in addition to cracking. He wants to show that it was not their regular procedure.

Mr. McKeever: I think it wasn't. I am willing for him to say it wasn't.

(Question read.)

A. It does not.

Q. Can you say of your own knowledge, speaking now of January, 1926, what type of treating apparatus was in use by the owners of then existing Cross cracking plants?

A. The majority of them depended upon the acid treating and re-running. The Quinlan Company and Sims of Dallas were using the liquid phase. The Barnsdall was using the Gray vapor phase. There may have been some other processes. If there were I don't know of them. The majority of our other licensees used the conventional type treating.

Q. And that is what you referred to in answer to one of Mr. McKeever's questions when you said conventional method of treating?

A. Yes, sir.

Mr. Marsh: Your Honor, we will have to produce one or two exhibits in connection with this matter of the qualification of Mr. Welling as vice president of the Cross Development Corporation, and one or two other matters, and may I reserve the right to complete my examination when those papers arrive?

The Court: Certainly.

Mr. Marsh: I can't put in the re-direct without the papers.

[fol. 425] Mr. McKeever: That is perfectly all right. I have no more questions, if Your Honor please, to ask this witness.

Mr. Marsh: Mr. Welling will be back here next week. My next witness will be Dr. Roy Cross, and I feel very certain I could not complete his testimony this morning. My suggestion would be that we offer at this time the Gray deposition.

The Court: I think it would be a good idea.

Mr. Hale: If there is no objection I will impersonate Mr. Gray, and allow Mr. Marsh to interrogate me, which will make it rather clearer to the jury. We assume that there is no need of putting this deposition into the record?

The Court: Oh, no. You offer the deposition of whom?

Mr. Marsh: We offer the deposition of Thomas T. Gray, taken in New York on April 19, 1929.

The Court: Admitted.

(Deposition of Thomas T. Gray read in evidence.)

## Deposition of Thomas T. Gray

UNITED STATES DISTRICT COURT, DISTRICT OF MAINE, SOUTHERN DIVISION

At Law. No. 1134

GASOLINE PRODUCTS COMPANY, INC., Plaintiff,

vs.

CHAMPLIN REFINING COMPANY, Defendant

New York, N. Y., April 19, 1929—10.30 A. M.

Deposition of Thomas T. Gray, Taken Before Charilaus G. C. Raphael, Esq., a Notary Public, Pursuant to Notice and Stipulation Herein.

Appearances:

Messrs. Taylor, Blanc, Capron & Marsh, Attorneys for Plaintiff, By John B. Marsh, Esq., of Counsel.

Messrs. McKeever, Moore & Elam, Attorneys for Defendant, By H. G. McKeever, Esq., and Harry O. Glasser, Esq., of Counsel.

[fol. 426] THOMAS T. GRAY, a witness called on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Marsh:

Q. Will you state your full name, age, and your place of residence?

A. Thomas T. Gray, age 47. I am living at 1353 North Avenue, Elizabeth, New Jersey.

Q. Now, will you please state your present occupation?

A. Present occupation, President of the Gray Processes Corporation, and President of the Gray Industrial Laboratories.

Q. Will you state your education, Mr. Gray?

A. Chemical training, Columbia University.

Q. Will you state, Mr. Gray, what special subjects you have specialized on in college or in your technical school?

A. Organic chemistry and general chemistry. General chemical courses.

Q. When did you complete your college course?

A. I never graduated from Columbia, as a matter of fact. I attended Columbia while I was still chemist at the Tidewater Oil Company. The Tidewater Oil Company gave me a leave of absence by which I went to Columbia one day and worked at the plant the next day.

Q. What was the nature of your employment by the Tidewater?

A. Chief chemist at the Tidewater Oil Company.

Q. Will you state briefly what your professional activities have been since that time?

A. I have a memorandum, if I may refer to it.

Q. You may do so.

A. Under "Experience," 25 years experience in the petroleum industry. Chief chemist at the Tidewater Oil Company from 1903 to 1915. Since 1915 engaged in private work as petroleum technologist; at one time consulting technologist to the Sinclair Refining Company; Swan & Finch Company, and the United States Bureau of Mines, and others.

Q. You stated that you are now the President of the Gray Processes Corporation. Will you state briefly what the nature of the business of that corporation is?

A. The Gray Processes Corporation licenses a process which I invented some time ago for refining gasoline produced by cracking.

[fol. 427] Q. How long has that corporation been in business?

A. Since the fall of 1924.

Q. Will you state what connection you have had with the corporation since its organization?

A. Yes. I have been president since it was organized, and I have had a great deal to do, of course, with the development and research.

Q. Will you state briefly the nature of the Gray process the nature and purpose of the Gray process?

A. The Gray process consists of treating—this is broadly—petroleum hydro-carbons in the vapor phase, with a catalytic agent, by which they are refined. In the case

of cracked gasoline certain objectionable hydro-carbons are caused to polymerize with the formation of high-boiling, colored products, which by virtue of the high-boiling point are condensed and are separated in the vapor stream.

Q. Will you state briefly the nature of the apparatus which is employed in the use of the Gray process?

A. The apparatus consists of a tank with a vapor inlet and outlet, with a vapor permeable shelf for the support of the catalyst, an outlet for polymers and any condensate which may accompany the polymers.

Q. You have spoken of a catalyst. Will you explain what a catalyst is and what catalyst is used in the Gray process?

A. A catalyst is anything which aids or accelerates a reaction. We have used Fuller's Earth.

Q. What is Fuller's Earth, Mr. Gray?

A. Fuller's Earth is a high graded silicate of aluminum, a product that is mined.

Q. How expensive is it?

A. It varies in price according to the mesh, at the mines from $9 to $18 per ton.

Q. $18 per ton. And what would be the cost of Fuller's Earth delivered at Enid, Oklahoma?

A. The nearest Fuller's Earth mined to Enid, Oklahoma, I believe, would be Olmsted, Illinois. I should imagine that the freight rate per ton from Olmsted to Enid would not be in excess of $5.00.

Q. Mr. Gray, when was the first commercial installation of the Gray process made?

A. The first commercial installation of the Gray process [fol. 428] was in the plant of the Barnsdall Refining Company at Barnsdall, Oklahoma, in the late summer or early fall of 1924.

Q. Will you state with reference to this installation what type of refining apparatus it was used with, or installed for use with.

A. The first unit was installed in connection with a re-run still, and the type of distillation was semi-continuous. By semi-continuous I mean that a certain amount of pressure distillate was charged into the still, and as the distillation progressed the pressure distillate was constantly pumped into the still.

Q. Mr. Gray, you spoke of this unit that you have just described as the first unit. What additional units, if any, have been installed at Barnsdall—Gray units?

A. Sometime after the installation of the first tower, Barnsdall installed two Cross cracking units, and to these units connected three Gray units.

Q. Will you state what you mean by the term "Cross units"?

A. Cross units is the type of cracking equipment put in, and got its name from Dr. Cross—I don't know which Dr. Cross—the inventor of the process.

Q. Do you know what the capacity was of the Cross units at Barnsdall?

A. My memory is that each unit had a capacity of 1000 barrels of charging stock.

Q. So that the total capacity——

A. Would be 2000 barrels.

Q. Per day?

A. Per day.

Q. And what was the nature of the distillate treated by the Gray process coming from those Cross units?

A. From the Cross cracking unit, or included in the Cross cracking unit, rather, there was a bubble tower, which gave or delivered end point gasoline.

Q. Was that a clean gasoline?

A. Well, that was a raw gasoline, but of the desired distillation range.

Q. State whether or not that was a merchantable gasoline?

A. No, it wasn't.

[fol. 429] Q. It contained certain impurities?

A. It contained certain impurities which would have to have been removed in order to make a merchantable product.

Q. Will you state briefly what those impurities were?

A. The impurities in that particular gasoline, and depending a good deal upon the policy of the company behind the gasoline produced, which had to be removed, would be gum, and then in some cases the gasoline would have to be sweetened. However, all companies do not sweeten gasoline.

Q. Do you know what oil was used in the Barnsdall plant, what crude oil?

A. I believe Mid-Continent crude oil.

Q. Will you state the approximate date when the Gray towers at the Barnsdall plant were completed? I refer to the Gray towers used in connection with the Cross cracking units?

A. I haven't that date here, Mr. Marsh, but I believe it was early in 1926.

Q. Early in 1926?

A. Yes. I could locate that day over the telephone from the laboratory. If you want it ask me the question again.

Q. Well, I think I can locate the date for you later on in the examination.

A. I see. All right.

Q. I will ask you to state what companies are now using the Gray process of treating, and I will hand you a list appearing in a pamphlet describing the Gray process.

A. Alamo Refining Co., Barnsdall Refineries, Inc. (At two refineries); Beckett Company, Inc., Bilmont Refining Co., Bolene Refining Co., Golden Rule Refining Co., Kanotex Refining Co., Lubrite Refining Co., Marland Refining Co., Motor Fuel Products Co., Public Utilities Gas Co., Residuum Reclamation Corp., Shaffer Oil & Refining Co., Sinclair Refining Co., Standard Oil Co. of New York, Sun Oil Co., Texas Pacific Coal & Oil Co., Vacuum Oil Co., Waverly Oil Works, White Oak Gasoline Co., White Star Refining Co.

[fol. 430] Q. Are there any foreign licensees, Mr. Gray, using the Gray process?

A. Yes.

Q. Will you please name them?

A. Argentine: Argentine Government Oil Fields; Cia Ferrocarrilera de Petroleo. Belgium: Cie Belge du Gaz Catalytique. Canada: McColl-Frontenac Oil Co., Ltd. (At two refineries.)

Q. Mr Gray, of the licensees which you have listed, will you state which licensees are operating Cross cracking units in connection with the Gray process?

A. The Barnsdall Refineries, Inc., at two refineries. The name of that now, to get the record straight—I think when we first did business with them it was the Barnsdall Refining Company, and that name was later changed to the Barnsdall Refineries, Incorporated. That is the present

name of the company. The Marland Refining Company. Standard Oil Company of New York. Sun Oil Company. Texas Pacific Coal & Oil Company. Vacuum Oil Company. Waverly Oil Works.

Q. Of the foreign licensees, were there any of those?

A. Argentine Government Oil Fields. Cia Ferrocarrilera de Petroleo.

Q. Can you state the approximate number of Gray units which are now in operation?

A. I haven't checked that up lately, Mr. Marsh, but the last time I did, my memory is that it was around eighty. I imagine now it may be close to ninety.

Q. Will you state, if you now remember, approximately how many Gray units were in operation in January, 1926?

A. Yes, I would say about five or six.

[fol. 431] Q. Were any of those units used in connection with Cross units at that time?

A. My memory is that the Barnsdall plant was operated at that time. I am not absolutely certain of that date.

Q. I hand you a blueprint, which is marked "Gray Processes Corporation, No. 114, 1F1," dated January 5, 1926, and ask you to state what that described or what that relates to?

A. Well, this relates to the type of tower which we were building at that time.

Mr. Marsh: I ask to have this marked for identification as Plaintiff's Exhibit No. 1.

(Blue print marked Plaintiff's Exhibit No. I, of this date, for Identification, J. A. Butler.)

By Mr. Marsh: This exhibit was offered in evidence at the trial and marked Plaintiff's Exhibit "I."

Q. Will you state whether you are familiar, Mr. Gray, with the Standard Cross cracking unit of 1000 barrels capacity, such as was installed in the Barnsdall plant, or if you have examined a plant of that type?

A. Yes.

Q. Will you state whether you have ever examined the Cross cracking units installed by the Champlin Refining Company at Enid, Oklahoma?

A. I never have, myself, no.

Q. Have you any information as to the nature of those units, or the capacity?

A. Yes.

Q. Will you state the source of that information?

A. We sent one or two of our engineers to visit the Champlin plant, to check up their operation of vapor phase treating some time ago.

Q. Upon the basis of the information furnished to you, can you state the approximate capacity of the Cross cracking units installed by the Champlin Refining Company?

A. My memory of it is that they were 1000-barrel cold oil units.

Mr. Glasser: I will agree that there are two 2000-barrel units as disclosed by the contracts out of which this litigation arises.

By Mr. Marsh:

[fol. 432] Q. Mr. Gray, assuming that the capacity of the Cross cracking units installed at the plant of the Champlin Refining Company is as has just been stated, that is, two 2000-barrel units, will you state what capacity of Gray treaters would be required to treat the gasoline produced from those cracking units, based upon your experience?

A. Yes. They would have to have a capacity of 1200 to 1500 barrels per day treating capacity.

Q. Treating capacity. Will you state what would be the approximate cost of Gray treaters, of the type described in the blueprint, Plaintiff's Exhibit I for Identification, of the capacity you have just mentioned, as sufficient to handle the gasoline produced by said 4000 barrels capacity Cross cracking units?

A. I would say from $16,000 to $20,000.

Q. In that estimate you have included the cost of installation in place?

A. Installation in place, ready to operate.

Q. Ready to operate. Will you state whether this apparatus of the type manufactured in 1926 would have produced a merchantable gasoline from the output of the Cross cracking units at the Champlin Refining Company?

A. It would, yes.

Q. Would the color have been of the required standard?

A. Yes.

Q. Would the gasoline produced be sweet to the doctor test?

A. No.

Q. Will you state the methods which were in use at that time in January, 1926, for making gasoline of this character sweet to the doctor test?

A. There are two methods generally used. One, known as the Litharge treatment, and the other method was the hypochloride process in which chlorine was used.

Q. Will you state the approximate cost of treatment of cracked gasoline of this type by the Litharge method; the cost per barrel?

A. One cent per barrel or less; probably less.

Q. Will you state the cost of treatment of cracked gasoline of this type by the chlorination method?

A. I haven't any figures on that, Mr. Marsh, with me here. I could check that up, if there is any way I can do it.

[fol. 433] Q. Well, I do not want you to answer anything except from your own knowledge, Mr. Gray?

A. Yes.

Q. Can you state the approximate cost of the apparatus which would be required to use the Litharge method to handle 1,200 barrels a day?

Mr. Glasser: What method did you say?

Mr. Marsh: The Litharge method.

A. I could not state that offhand. That is the equipment that all refineries have ordinarily in their plant.

Q. Would it be in excess of $20,000?

A. No. I would say it was very much less than that, very much less than $20,000.

Q. Less than $10,000?

A. I should think so.

Q. Are you familiar, Mr. Gray, with the percentage of gasoline contained in the pressure distillates produced by the Cross cracking units of the type installed at the Champlin Refining Company?

A. You mean the percentage of gasoline in the pressure distillate produced by the Cross process?

Q. Yes, that is right.

A. Yes.

Q. Will you state approximately what the gasoline content is of those distillates?

A. From my memory of it, it is about sixty per cent.

Q. I show you a page in the pamphlet entitled "Vapor Phase Refining," page 13-E, containing a tabulation entitled "Operating Costs and Profit due to vapor phase refining on re-gunning of pressure distillates containing seventy per cent of gasoline compared with acid treating and re-running based on production of 1000 barrels of gasoline per day." Will you state, as a preliminary, whether the cost of treating the Cross cracked gasoline would be greater than this gasoline described in the tabulation?

A. The cost would be less.

Q. The cost of cracking the Cross cracked gasoline with the Gray treater would be less than the cost stated in this tabulation?

A. Yes.

Q. If the Gray treater is directly connected with the Cross cracking units?

A. Yes.

[fol. 434] Q. Now, Mr. Gray, I hand you a pamphlet entitled, "Vapor Phase Refining, The Gray Processes Corporation, 961-975 Frelinghuysen Ave., Newark, N. J.," and ask you to state what this pamphlet is?

A. The pamphlet describes the vapor phase refining process which The Gray Processes Corporation has been exploiting for the last four years.

Mr. Marsh: I will ask to have this pamphlet marked for Identification, Plaintiff's Exhibit 2.

(Pamphlet marked Plaintiff's Exhibit No. 2 of this date, for identification, J. A. Butler.)

(Said pamphlet was exhibited to the jury by agreement of counsel but was not offered in evidence.)

By Mr. Marsh:

Q. Will you state, Mr. Gray, whether you are familiar with a method of treatment of gasoline known as "Acid treating and re-running"?

A. Yes.

Q. Referring to page 13-C of Plaintiff's Exhibit No. 2 for Identification, I will ask you whether that states cor-

rectly the operating costs and profit due to direct vapor phase refining as compared with acid treating (exhibiting pamphlet to witness)?

A. That represents an average case with gasoline at the price calculated.

Mr. Marsh: I will offer that tabulation in evidence and ask that it be copied into the record at this point.

Mr. Glasser: All right. What pages are those?

Mr. Marsh: That is page 13-C.

(The tabulation contained on page 13-C of Plaintiff's Exhibit No. 2 for Identification is in words and figures as follows, to wit:)

[fol. 435] "Operating Cost and Profit Due to Direct Vapor Phase Refining as Compared with Acid Treating

Acid Treating 1,000 Barrels of Cracked Gasoline

| | Cost per 100 gals. | |
|---|---|---|
| Direct Labor | $ .01697 | |
| General Supervision | .00126 | |
| Repairs | .02995 | |
| Acid | .09075 | |
| Soda | .02399 | |
| Water, Steam, Electric light, power, etc. | .05462 | |
| Total | .21754 | |
| Cost per gallon | .002175 | |
| Cost per barrel | .09135 | |
| Cost per 1000 barrels | | $91.35 |
| Loss of 4% due to treating and Polymerization. 40 barrels at $3.36 | | 134.40 |

Cost of Rerunning 1,000 Barrels Less 40 or 960 Barrels

| | Cost per barrel |
|---|---|
| Direct Labor | $ .008374 |
| Supervision | .001631 |
| Repairs | .008807 |
| Stores Expenses | .000836 |
| Fuel expense—oil and gas | .031433 |

| | Cost per barrel | |
|---|---|---|
| Water | .003084 | |
| Steam | .013755 | |
| Electric light and power | .000397 | |
| Miscellaneous | .001378 | |
| Total | .069675 | |
| Cost for 960 barrels | | 66.88 |
| Loss of 4% due to re-running .04 × 960 = 38.4 barrels at $3.36 | | 129.02 |
| Total cost treating and redistilling 1000 barrels of gasoline (Carried Forward) | | $421.65 |

NOTE.—The figures given above are actual operating costs obtained from a representative refinery.

[fol. 436] By Mr. Marsh:

Q. This tabulation reads, does it not, that the cost per 1000 barrels by acid treating—or, will you state what the tabulation shows as to the cost of 1000 barrels by acid treating and re-running? I ask you to interpret it?

A. $134.40.

Q. And will you state what——

A. Now, here I am including in that, that is, I am giving the total cost including losses. Is that what you want?

Q. Referring to the tabulation on Page 13-C of the pamphlet, will you state what that shows to be the total cost of treating and redistilling 1000 barrels of gasoline, employing the acid treating method?

A. $421.65.

Q. Turning to page 13-d of the same pamphlet, Plaintiff's Exhibit 2, for identification, I ask you if that correctly states the cost of vapor phase refining of 1000 barrels of gasoline; is that what it does state on that page?

A. Yes.

Mr. Marsh: I will ask that that page, 13-d, be received and copied in the record at this point.

(The tabulation contained on page 13-d of Plaintiff's Exhibit No. 2 for Identification is in words and figures as follows, to wit:)

"Total cost acid treating and redistilling 1000 barrels ..... (Brot. Forward) $421.65 $421.65

Vapor Phase Refining Cost based on yield of 1000 barrels per ton of clay.

| | Clay recovered per ton | Clay used once and discarded | | |
|---|---|---|---|---|
| Transporting clay, steaming out the Polymerizers, discharging and recharging ..... | $3.00 | $3.00 | | |
| Roasting Clay ..... | 1.00 | | | |
| Clay Loss and Depreciation | 1.00 | 15.00 | | |
| Loss on treating—none. | | | | |
| Re-running dispensed with, therefore, no loss. | | | | |
| [fol. 437] Royalty 1000 barrels at 6¢ per barrel .... | 60.00 | 60.00 | | |
| Total cost Vapor Phase Refining 1000 barrels ..... | $65.00 | $78.00 | 65.00 | 78.00 |

Net profit due to Vapor Phase Refining 1000 barrels based on recovering clay ..... $356.65

Net Profit per barrel recovering clay ..... .35665

Net Profit due to Vapor Phase Refining 1000 barrels based on using clay once and discarding ... $343.65

Net profit per barrel using clay once only ..... .34365

Taking $350.00 as an average figure, or 35c per barrel, one Tower handling 1000 barrels per day at an approximate installation cost of $12,000.00 would yield over a year of 300 days, over $100,000.00 or 800% on the investment."

By Mr. Marsh:

Q. Then, will you state what is the total cost as appears from page 13-d of Vapor Phase Refining of 1000 barrels of gasoline?

A. $78.

Q. Now, Mr. Gray, will you state whether those would represent the costs of the Gray treating process as in use in January, 1926 (indicating page 13-d)?

A. They are roughly correct, but as I recall the price of gasoline, it is a little different to-day.

Q. The type of gasoline?

A. The price of gasoline is a little different to-day, and these figures try to keep pretty even with the day I start them.

Q. In 1926?

A. Which would not affect the cost of treating but it would affect the profit.

Q. Well, this cost of Gray vapor phase treating for 1000 barrels, of $78, means a cost per barrel of 7.8 cents?

A. Yes.

[fol. 438] Q. Will you state what additional cost would be involved in making the treated gasoline sweet to the doctor test?

A. One cent a barrel or less by the Litharge method.

Q. Making a total cost of not exceeding 8.8 cents per barrel for a doctor sweet gasoline?

A. Yes.

Q. Will you state whether those figures would be approximately correct for cracked gasoline produced by the Champlin Refining Company from its Cross cracking units of the type installed in January, 1926?

A. Yes.

Q. Mr. Gray, what is the standard royalty of The Gray Processes Corporation as in force in 1926?

A. Six cents per barrel of 42 gallons of finished product.

Q. Will you now state what the total cost for operation and for royalty would be, the total cost per barrel of gasoline treated?

A. That has got the royalty in it, hasn't it?

Q. Does that include the royalty?

A. I was just trying to see here. No, I do not believe it has—yes, it has—that has the royalty in it, you see (indicating).

Q. Then the answer is that the figures you have already given include——

A. Yes, the figures I have already given include the royalty of six cents a barrel.

Q. Will you state, Mr. Gray, whether you have had any negotiations with representatives of the Champlin Refining Company with reference to the installation of Gray treaters for use in connection with cracking units?

A. Yes, I have.

Q. Do you remember, and if so, will you state, when the earliest negotiations took place?

A. In the early part of 1926.

Q. Can you locate that by any conference or letter?

A. I have a letter, a copy of a letter written to Mr. Champlin here, on January 20, 1926 (producing paper).

Q. Can you let me have this copy?

A. Yes.

Mr. Marsh: I will ask to have this copy of letter dated January 20, 1926, from Mr. Gray to Mr. H. H. Champlin, President, Champlin Refining Company, marked for Identification, Plaintiff's Exhibit 3.

[fol. 439] (Carbon copy of letter marked Plaintiff's Exhibit No. 3 of this date for Identification, J. A. Butler.)

This letter was offered in evidence at the trial and was marked Defendant's Exhibit No. 59.

By Mr. Marsh:

Q. In this letter, Mr. Gray, you call the attention of Mr. Champlin to the willingness of your company to issue a license for the Gray process to the Champlin Refining Company, do you not?

A. Yes.

Q. Did you specify in the letter the Cross cracking process as one of the types with which the Gray process could be used?

A. Yes.

Mr. Marsh: Of course, those are leading questions.

Mr. McKeever: Well——

Mr. Glasser: The letter is the best evidence.

Mr. Marsh: The letter is the best evidence, yes.

Mr. McKeever: It will show what he said.

By Mr. Marsh:

Q. When was the first occasion on which you saw personally any representatives of the Champlin Refining Company in connection with this matter?

A. Some time after writing this letter I visited Enid, Oklahoma, and saw Mr. H. H. Champlin, president of the company, at the hotel there in Enid, I have forgotten the name of it.

Mr. Glasser: The Oxford.

The Witness: At the Oxford Hotel.

By Mr. Marsh:

Q. Will you state the substance of your conversation with Mr. H. H. Champlin, on that occasion?

A. I went over the process with Mr. Champlin and explained it to him and showed him a blueprint of the plant being operated, and, as I remember, I told him the approximate cost of installing the process and the cost of operating, as we figured it at that time. I remember very definitely that he asked me if I would leave a blueprint of the tower with him, but I did not leave it, apparently.

[fol. 440] Q. Will you state whether the plan or blueprint of the Gray process which you explained to Mr. Champlin on the occasion of this visit was similar to the blueprint marked Plaintiff's Exhibit 1 for identification?

A. Yes.

Mr. Glasser: Now, Mr. Marsh, if you want to be sure about that you had better change that word "Similar," because we certainly would not want to agree that it was similar, because unless it was an exact copy of the blueprint it certainly would not be material.

Mr. Marsh: I assume that Mr. Gray can possibly tell that it was the same.

Mr. Glasser: Well, if that is dated 1925——

Mr. Marsh: No, 1926.

Mr. Glasser: Well, that is prior to this letter, ten days before that letter.

Mr. Marsh: Yes.

By Mr. Marsh:

Q. Can you state whether the blueprint was identical with the blueprint, Plaintiff's Exhibit No. 1 for identification?

A. No, I cannot state it was identical with it, but that was in the fairly early stages of the development of our process and we did not have many different prints of towers, so I assume that it is identical with it.

Q. Will you state whether in your recollection the apparatus described by you to Mr. Champlin was for all practical purposes the same as the apparatus described in this blueprint?

A. Oh, absolutely.

Q. There would be no very great variation in cost, or in cost of operation, or results of operation?

A. No.

Q. Are you able to place the approximate date of that conversation with Mr. Champlin?

A. My memory is that it was in February, 1926; around there.

Q. Was there any other representatives of Mr. Champlin's company present at this conference?

A. No; my brother was with me.

[fol. 441] Q. What is your brother's name?

A. A. M. Gray.

Q. On the occasion of this visit to Enid, do you remember meeting any representatives of the Gasoline Products Company?

A. Yes.

Q. Will you state their names?

A. At least I assume they represented the Gasoline Products Company. I don't know that definitely, but I met L. H. Harvison and P. C. Keith, Jr.

Q. Mr. Harvison and Mr. Keith were not present at your conference with Mr. Champlin, were they?

A. No, they were not.

Q. In the course of your conference with Mr. Champlin, was any reference made to Gray treaters in use at the Barnsdall Refining Company's plant.

A. Yes. Yes, we described the operation and results of that plant that was operating at Barnsdall and asked Mr. Champlin when he could to run up and see it in operation.

My memory of the conversation is that he was anxious to see it in operation.

Q. Will you state whether you recollect the type of crude oil that Mr. Champlin proposed to operate on in his Cross plant?

A. My memory is that it was Mid-Continent crude.

Q. Would that give any indication as to whether the results of the Barnsdall Refining Company operations would be similar to the operations at the Champlin plant?

A. They ought to be practically the same, operating the same type of cracking system, and the same type of crude.

Q. There would be variations, would there not, based on the quality of gasoline, from the point of view of end point?

A. You mean between the two different plants?

Q. Yes, between the two.

A. It would be slight, unless they purposely made different end points by intention.

Q. Would the difference in end point of gasoline produced materially affect the cost of treatment by the Gray process?

A. No, not to any great extent, unless one plant should manufacture a much higher end point product, in which case the cost would be somewhat in excess, but not much. [fol. 442] Q. When you say "somewhat," do you mean five per cent or fifty per cent?

A. Oh, no, not fifty per cent. More of the nature of five per cent than fifty per cent.

Q. That would not affect the royalty, would it?

A. It would not affect the royalty at all.

Q. Referring to the tabulation on page 13c and 13d of Plaintiff's Exhibit 2 for Identification, it appears that the cost of treating by the Gray process per 1000 barrels is $78, including a royalty of 6 cents per barrel, or $60. Will you state what that indicates to be the operating cost of the treating process for the 1000 barrels?

A. Well, that would be $18.

Q. Now, assuming that the operating conditions and charging stock are the same in the Barnsdall plant and the Champlin plant, will you state how that operating cost would be affected if the Champlin plant was so operated as to produce gasoline of a higher end point?

A. Than the——

Q. Than the Barnsdall. That is the $18 so-called operating cost of the Gray treating process?

A. If they produced gasoline of a higher end point at Champlin than at Barnsdall the cost would be slightly in excess of Barnsdall.

Q. Will you state what in your opinion would be the maximum increase in cost per 1000 barrels?

A. That would depend entirely, Mr. Marsh, on the difference in the end points of the two gasolines, how much higher and what the degree of difference. But it could not in any event be great, assuming that in one case 4.37 end point gasoline were made, whereas in the other case 4.00 or 4.10 end point were made.

Q. Assuming the widest possible variation of conditions between the typical operation described on page 13d of your pamphlet, by using Mid-Continent crude, that is, the widest possible variations of the type of crude used, and the quality of gasoline produced, what would be the maximum variation or increase in the cost of treating per 1000 barrels, in your opinion?

A. I would say approximately one cent a barrel.

[fol. 443] Q. Will you now state, Mr. Gray, whether or not in your conference with Mr. Champlin, you submitted estimates of the cost of treating Cross cracked gasoline by the Gray treating process?

A. Yes. I do not remember definitely of the particular phase of it, but we went over the whole matter with him and spent an hour or more with him in the Oxford Hotel there.

Q. Can you state, and if so, will you state whether the costs which you represented to him, the operating costs for the Gray treater were approximately the same as the costs summarized on page 13d of the pamphlet?

A. I would say they are approximately the same, Mr. Marsh.

Q. Will you state when the Marland Refining Company Gray treating towers were installed, approximately?

A. I do not remember, Mr. Marsh, when they were installed.

Q. Now, Mr. Gray, will you state when the next conference took place between yourself and any representative of the Champlin Refining Company with reference to the installation of Gray treating towers for the Champlin Refining Company?

A. On May 19, 1926.

Q. Will you state how you are able to place that date?

A. We have kept for some time a sort of diary in the office as to visits of important people, and we did that particularly when we were starting, and I have such a record in that diary.

Q. Will you read the record to which you refer?

A. It is dated May 19, 1926. (Reading:)

"Messrs. Jameson & Jackson, Directors of Champlin Refining Company phoned on May 18th from New York and made an appointment to see Mr. Gray. With them was Mr. H. O. Glasser of the legal department of the above refinery. They called to discuss the vapor phase process and its adaptability to their plant at Enid. They said that they would either put in our process or use the old acid treating method, whichever they decided would work out better in their plant. Mr. Glasser returned to Enid, and after talking to Mr. Champlin will communicate with us. They were interviewed by T. T. Gray." That is the only memorandum.

[fol. 444] Q. Mr. Gray, does that state the substance of your personal recollection of that interview?

A. Yes.

Mr. Marsh: Do you want to look at this?

Mr. Glasser: No. I just want to look at the date, that is all.

The Witness: You have to look back a few pages to get the year.

By Mr. Marsh:

Q. Will you state whether the Mr. Glasser present at that interview is the Mr. Glasser who is attending this deposition?

A. He is.

Mr. Marsh: Is there any question about that?

Mr. Glasser: No. It does not show who did the telephoning to make the appointment. That is the only trouble with that.

The Witness: I did not answer the telephone.

Mr. Glasser: Mr. M. W. Kellogg did the telephoning.

By Mr. Marsh:

Q. Will you state whether the Gray Processes Corporation conducts any experiments with reference to the manner of treating gasoline?

A. Yes, they conduct a great deal of experimental work and research work.

Q. Will you describe the facilities that you have, in a general way?

A. We have a well equipped—we have the facilities of a well equipped laboratory with about eight chemists or chemical engineers.

Q. Are these men——

A. —who are constantly working on improvements of vapor phase refining, or on other problems.

Q. Will you state whether or not you have made any experiments with reference to the use of copperized clay as a catalyst?

A. Yes, we have made a great many experiments.

Q. Will you state briefly the result of those experiments?

A. The result of our experimental work with copperized clay, that is, clay that is impregnated with copper, due to the wetting of the clay with a copper solution and later roasting it has indicated that it would be an exceptionally costly process due to the fact that it seems very difficult to regenerate the copperized clay.

[fol. 445] Q. State what you mean by regenerate, Mr. Gray?

A. The object of using the copperized clay in the first place is to either doctor sweeten the vapors coming in contact with the copperized clay, or to reduce the sulphur content. What is that question?

Q. I asked you what you meant by regenerate?

A. So that in this process the copper oxide or copper metal, or whatever it may be, is transformed to a copper sulphide which then becomes inactive. And in order to make this copper useful the sulphide would have to be roasted, in the presence of air, to copperoxide.

Q. Will you state what your experiments have indicated as to the possibility of restoring the qualities of the copper?

A. Our experiments indicate that it is an impractical process.

Q. You are referring now to the re-use of the clay?

A. Yes. In other words, we have found no satisfactory means of regenerating that copper sulphide in the clay.

Q. Do your experiments show whether this is an impossibility in the sense of being impossible to attain, or impossible from the point of view of costs? I am simply trying to get you to define what you mean by impossible.

A. Well, impossible, no, not to attain, but impossible—impractical, rather, I think I said, from the point of view of cost.

Mr. Marsh: I think that is all I want to ask Mr. Gray. Now, do you want to take a recess?

Mr. Glasser: No. I do not want to ask him very many questions. I think we can conclude now, if it will suit his convenience.

The Witness: Yes.

Cross-examination.

By Mr. Glasser:

Q. Referring first to the blueprint which has been identified as a part of your direct examination, I will ask you to state if this blueprint discloses the point of entry of the vapors in your tank, and, if so, will you kindly indicate it (hands blueprint to witness)?

A. (Examining blueprint.) No, I do not see it here, Mr. Glasser, but——

[fol. 446] Q. Can you indicate for the advice of the jury, where the point of entry should have been indicated on that blueprint?

A. Wait a minute. Now, let's see. I will find that yet (examines blueprint).

Q. I looked at it hurriedly, and I could not find it.

A. That answer to the first question should say that the inlet is shown on the bottom of the outer shell.

Q. Will you kindly indicate that on the face of the blueprint itself?

A. I would not swear that that is the inlet, so I will let it go at that. I do not see the inlet on this thing. But the inlet, if that is permissible, was at the bottom on the outer shell.

Q. Now, Mr. Gray, when you first put this process into operation, your inlet was at the top of the tank, was it not?

A. No.

Q. Where was the inlet in the Barnsdall tanks, the first one that you installed?

A. The inlet in the first installation was at the bottom.

Q. How does your patent show the inlet, the first patent?

A. Well, now, you mean what?

Q. The inlet of the vapors?

A. How does the drawing show it?

Q. Yes, how does the drawing or the patent show it?

A. The drawing shows it at the top.

Q. When did you change it from the top to the bottom?

A. What do you mean, when did we change it?

Q. Well, strike out the question. Were your installations made in accordance with the drawing attached to your patent?

A. No.

Q. Why not?

A. Because the drawing in the patent was only to show how to operate the process.

Q. Then——

A. One method of operation.

Q. Then the process was not affected by the point of entry of the vapors?

A. No.

Q. It would be your judgment that vapors entering at the top, if it was feasible to have them so enter, would go through the same polymerization process as if those vapors had entered at the bottom?

A. Right.

[fol. 447] Q. Now, Mr. Gray, I will ask you to state what the cost of the Marland Gray units were, referring particularly to the ones installed after the Cross plant was installed at Marlands, for 1000 barrels Cross charging stock capacity?

A. I do not remember what they were.

Q. Well, approximately?

A. Is that cold oil or——

Q. Well, I am referring to your units now. I am not referring to the Cross.

A. Yes, but in conjunction with Cross.

Q. Yes.

A. Our units would vary according to whether they were hot oil or cold oil.

Q. Well, having in mind the units installed at the Marland plant to be used in conjunction with the Cross cracking plant, what did the Marland pay your company for the units that you had installed, after the completion?

A. They never paid us anything, and we never installed any for them.

Q. Who did?

A. The M. W. Kellogg Company, I believe.

Q. Well, they were installed under a license?

A. I do not believe they did. I believe somebody else installed them or they did themselves.

Q. Well, they were installed under a license of your company?

A. Yes.

Q. You do not know what the cost was?

A. I do not know.

Q. Do you think it was anything like $16,000 for a 4000-barrel capacity.

A. Are you speaking now of charging stock?

Q. No. I am referring now to the cost of installation of the Gray treaters at the Marland plant, as bearing upon what the cost of installation of those treaters was.

A. Yes, but you said 4000 barrels. 4000 barrels of what, gas, oil or charging stock?

Q. No, I am fixing now the capacity of the plant at two 2000-barrels Cross units, 4000-barrels Cross charging stock capacity. We can understand this a little better, I guess, if I ask you a question. Mr. Marsh covered it and I thought you would have it clearly in mind. What capacity in Gray [fol. 448] treaters would have been required to have cared for two 2000-barrel Cross units, in the Champlin plant?

A. Oh, I would say 1200 to 1400 barrels a day of gasoline.

Q. What would be the cost of that installation if you had made it at that time?

A. $16,000 to $20,000, I should say.

Q. What was the cost of similar installations at the Marland plant at Ponca City at that time, if you know?

A. I do not know what it cost. We did not build it, and therefore I do not know what it cost.

Q. But it was built under blueprints that you furnished the Kansas City Structural Steel Company?

A. It was built under blueprints that we furnished Marland.

Q. But you did furnish the Marland with blueprints for the construction of those units?

A. Yes.

Q. Now, the pamphlet about which Mr. Marsh has been asking some questions has not been generally circulated in the trade, has it?

A. Yes, it has.

Q. For what period of time?

A. For the last two years.

Q. How did you happen to be in Enid about the time that Mr. Harvison was in Enid; do you remember?

A. I went there to see Mr. Champlin, in order to interest him in putting this process in his plant, our process.

Q. You met Mr. Harvison at Enid at that time, did you not?

A. Yes.

Q. And Mr. Keith?

A. Yes.

Q. Did you have any communication with Mr. Harvison or Mr. Keith before you came to Enid about the fact that they were going to be there?

A. None.

Q. You had some argument with Mr. Harvison up in the Oxford Hotel that day, did you not, Mr. Gray?

A. I had an argument with him there one day.

Q. Well, that was the only time you ever met him in the Oxford Hotel, was it not?

A. No, I think I met him two or three times.

[fol. 448] Q. That was the same day that you talked to Mr. Champlin, was it not?

A. I would not say that it was; no.

Q. Did you ever talk to Mr. Champlin?

A. I do not think it was, as a matter of fact.

Q. Just a moment, now. Did you ever talk with Mr. Champlin on more than one occasion in the Oxford Hotel?

A. Yes, I think so.

Q. You think you met him there more than one day?

A. I think we may have stopped in his office one day.

Q. I am not talking about his office. I asked you if you met him there more than one day?

A. No.

Q. Did you ever talk with Mr. Harvison on more than one occasion at the Oxford Hotel?

A. Yes.

Q. At separate times, or upon more than one occasion at the same time?

A. At separated times.

Q. Did you have an occasion when you met both Mr. Harvison and Mr. Keith at the Oxford Hotel, when the

matter of the Champlin installation was the subject of discussion?

A. By Champlin installation, you refer to what?

Q. The Champlin installation of the cracking process and the treating process in connection therewith?

A. Yes.

Q. You felt considerably aggrieved at Mr. Harvison's attitude at that time, did you not?

A. Yes.

Q. You felt, to use a slang expression, that he had doublecrossed you?

A. Well, I don't know that I felt that he doublecrossed me, but I felt that he was giving us some competition that did not strike me as if it were going to help us any.

Q. The competition that he was giving you, you discovered was neither fair nor square, didn't you; isn't that what you told him?

A. I did not feel that it was.

Q. That is what you told Mr. Harvison there in the lobby of the hotel?

A. I believe I said something similar to that.

Q. How did you learn there in the hotel about what Mr. Harvison was promising Mr. Champlin?

A. Well, I am not absolutely positive of that, but I think I learned that from Mr. Marner.

[fol. 450] Q. You learned, however, while you were there in Enid, and on a day when Mr. Harvison and Mr. Keith were going from the Oxford Hotel to Mr. Champlin's office and Mr. Champlin was coming to the hotel, you learned that Mr. Harvison and Mr. Keith were going around your process and making representations to Mr. Champlin about a so-called vapor phase treating system tower that was being represented to Mr. Champlin as being a superior process by reason of including in its process a so-called copperized clay treatment, did you not?

Mr. Marsh: Just a minute. Off the record——

The Witness: I would like to have you read that again. I think that is a pretty long question.

Mr. Marsh: Off the record——

(Discussion off record.)

Mr. McKeever: Read that question. It sounds like a good question to me.

(Question read by the stenographer.)

A. I didn't know that, Mr. Glasser, but I heard that they were offering——

By Mr. Glasser:

Q. That is what I am asking you. Didn't you hear that?

A. You asked me didn't I know it.

Q. Didn't you learn that they were making those representations?

A. I did not learn, as I understand that question, of them making all those representations. I learned or heard that they were offering a vapor phase treating process.

Q. What kind of a vapor phase treating process?

A. I heard that it was the Cross vapor phase process.

Q. What did you hear that the Cross vapor phase process was alleged to stand for?

A. I heard that the Cross treating process was a method of using Fullers Earth or similar material, impregnated with a copper compound.

Q. That was the thing that you had your quarrel with Harvison about?

A. It was.

[fol. 451] Q. And about Harvison being associated with that kind of a representation?

A. I do not know about that.

Q. Well, you said some pretty strong things to him at the hotel?

A. I think——

Q. You got mad and lost your temper and cussed him out?

A. I would not be surprised if I did.

Q. And that was all predicated at the time upon these representations upon Mr. Harvison's part that you felt were taking away from you business that might otherwise come to you?

A. Are you asking me a question?

Q. Yes, I am asking you if that is not a fact. Read the question.

(Question read by the stenographer.)

A. I felt that he was endeavoring to get business through this so-called Cross process that otherwise would come to me.

Q. You also knew that one Mr. Schofield, a patent attorney from Kansas City, was in Enid, and was making representations as to the invalidity of your patent, did you not?

A. I did not know that he was in Enid, but Mr. Champlin said something to me which would indicate that he had a report from some patent attorney.

Q. Well, Mr. Champlin told you very clearly in the hotel on that evening that it had been represented to him by Mr. Harvison and Keith and Schofield that your patent was invalid, and that you had no patent; isn't that so?

A. No, I do not recall it that way.

Q. You do not recall it?

A. No. I——

Mr. Marsh: Off the record.

(Discussion off record.)

By Mr. Glasser:

Q. You knew that Mr. Schofield had been engaged by Dr. Cross in Kansas City prior to the month of January?

A. No, I don't think I ever heard of Mr. Schofield at that time.

[fol. 452] Q. You knew that the Cross people had made an extensive investigation in Washington as to the validity of your patent at that time, did you not?

A. No, I did not know that.

Q. Then, the first information that you had that the Cross people were challenging the validity of your patent was in the Oxford Hotel in Enid; isn't that correct?

A. That was the first information I had that they were endeavoring to sell this so-called Cross process.

Q. Had you had any information prior to that time that they were challenging the validity of your patent?

A. No, I don't think so.

Q. Now, your patent application was pending for a long time in the Patent Office, was it not, Mr. Gray?

A. About six years, as I recall it.

Q. And it involved a change of patent attorneys upon more than one occasion?

A. Yes; I think one died so we had to change, we had to get a new one.

Q. And it involved the change of the First Examiner, who steadfastly refused to approve your patent?

A. I do not recall that. That is all shown in the history of the patent, so I do not think I could add anything to it.

Q. Did you furnish Mr. Champlin with any data, in either narrative or computative form, as you have in this, on the night—at the time of your visit there in Oxford?

A. No.

Q. Your entire representations were verbal at that time?

A. As far as I recall.

Q. And his talk with you was wholly verbal?

A. As far as I recall.

Q. How did you happen to meet Mr. Champlin in the hotel on that night, do you remember?

A. Yes, we called him up.

Q. Who?

A. I think my brother.

Q. Did your brother go out to the refinery the next day?

A. I do not know.

Q. Did you go out to the refinery the next day?

A. I went out there one day.

[fol. 453] Q. Well, who went out the next day?

A. I think he went out one day when I wasn't there, and I think we went out together one day.

Q. Are you able to fix your visit to the refinery with reference to your conversation with Mr. Champlin in the hotel?

A. No.

Q. It was on your same visit to Enid, was it not?

A. Yes.

Q. And you did not stay in Enid more than two days after your visit with Mr. Champlin?

A. I would say two or three days.

Q. Well, within that period you visited the refinery?

A. Yes.

Q. And you had a conversation with Mr. Slater, the superintendent?

A. I saw Mr. Slater there.

Q. And you had known Mr. Slater prior to that?

A. Yes.

Q. Your brother had worked with him at Lawrenceville, Illinois?

A. I don't know.

Q. Which of the Slaters did you have the conversation with when you went out there?

A. I met both Mr. Slaters.

Q. And had a conversation with both?

A. I talked with them.

Q. And in that conversation you told both the Slaters what you thought about Harvison and Keith and what they were doing down there?

A. I do not recall the conversation.

Q. Well, it has to do with what Mr. Harvison and Mr. Keith had done to you, hadn't it?

A. I was pretty sore when I got out there, but I do not recall definitely the conversation at the plant with the Slaters.

Q. So that the conversation at the refinery had to do with the so-called vapor phase treating system?

A. Well, I should think it would be a natural topic of conversation.

Q. Are you able now to recall just what you said to Mr. Slater?

A. No.

Q. Are you able to recall the substance of what you said?

A. No, sir, I am not. That is a good many years ago.

[fol. 454] Q. Now, with reference to the item in your diary that you have read from, did you make that entry in that book yourself, or was that made by someone else?

A. That was made by my secretary.

Q. And the statement there contained that Messrs. Jameson & Jackson phoned you, of course you are not advised of that of your own personal knowledge, are you?

A. Well, I knew that they called. I believe I was there that day.

Q. Well, you assume that they called. You did not talk with the person who put in the call, did you?

A. Well, in as much as they came out the next day it is quite evident that they called.

Q. That is what I am asking you. Is that an assumption on your part or do you know that Mr. Jameson and Mr. Jackson made that appointment?

A. Well, I do not say definitely that they called on the telephone, called the number, and all that sort of thing, but I say they instigated the call, and on that account the call was made.

Q. Isn't it a fact that that call was made by Mr. M. W. Kellogg of the M. W. Kellogg Company on the day previously, and that the conference was arranged by Mr. Kellogg in an effort upon his part, and wholly upon his part, to bring about a compromise and a settlement of the difficulty that had arisen amongst us?

A. I could not answer that yes or no.

Q. Now, the M. W. Kellogg Company are the selling agents for your process and license under your patent now, are they not?

A. In connection with some types of cracking, yes.

Q. Well, the Cross?

A. Cross, right.

Q. When did they become such selling agents?

A. The contract was dated December 9, 1926, and was delivered to Theodore Kenyon with two letters, in escrow, dated December 8, 1926, and another letter of instructions dated December 9, 1926, the date that the contract was executed, and pursuant to those instructions actual delivery of the contract to the parties was made on February 10, 1927.

[fol. 455] Q. Can you give us the number of commercial licensees prior to the 9th day of December, 1926, that were using your process, either in completed units or units then under construction?

A. Fourteen.

Q. Now, after the Kellogg Company became selling agents for your process, the installation of a Cross process carried with it the installation of a Gray process, did it not?

A. Not necessarily.

Q. Have there been any installations of Cross processes since your contract with Kellogg in which the Gray process was not installed with the Cross process?

A. There have been quite a few, I believe. In fact, I would say that the majority of them have been without our process.

Q. Now, when you learned of this so-called Cross vapor phase treating system tower, with its attendant copperized clay, what, if any, laboratory experiments did you conduct in connection with such process?

A. After we learned of that process, we conducted a great many experiments with it.

Q. And what did you learn from those experiments?

A. And what we learned from those experiments was that the yield which was indicated in sweetening was not large, and that it was impractical. There seemed to be no available method of efficiently regenerating the clay so that you could recover the value of your copper for use in further sweetening.

Q. Is it not a fact that the copper could have been regenerated or recovered at a prohibitive cost?

A. Oh, yes; no doubt about that.

Q. Now, did you convey to Mr. Keith or Mr. Harvison or Mr. Kellogg or Mr. Atwater, or any other of the gentlemen connected either with the Kellogg Company or the Gasoline Products Company, and particularly Mr. Welling, that information?

A. I do not remember that I did. No, I do not think so.

Q. Well, did any one in your organization convey that information to any of them?

A. I do not think so.

[fol. 456] Q. Was that matter discussed during the period of time you were in negotiation here with the Kellogg Company to act as your selling agents, in the summer of 1926?

A. I think probably it was, yes.

Q. Isn't it a fact that you so advised Mr. Kellogg, that is, that the cost of the recovery of the copper was prohibitive?

A. I think it is probably likely.

Q. You also learned during the summer of 1926 that Dr. Cross and his associates had probably learned the same thing.

A. I do not remember anything of the kind.

Q. Did you ever talk with Mr. Keith, about the month of May, 1926, with reference to the cost of the recovery of the clay in the Fullers Earth in the so-called Cross process?

A. I do not remember.

Q. Did you know a Mr. Mitchell in Kansas City, an engineer?

A. Mitchell? I do not recall him, no.

Q. You do not recall having had any conversation with Mr. Keith in person?

A. No, I do not.

Q. Did you have any talk with Mr. Welling in person about the impracticability or prohibition in cost in the

operation of the so-called copperized flame method of treatment?

A. I do not recall it.

Q. I will ask you, then, from a technical standpoint, as to whether all the objections that you learned of with reference to the so-called copperized clay method of clarification, are included in your answers that you have heretofore given here today?

A. All of the objections.

Q. Yes.

A. That I found have been included?

Q. Yes. Have you covered them all? If there is anything that you have not covered either in your answers to Mr. Marsh's questions or mine, as to objections to the so-called Cross vapor phase copperized clay treating process?

A. I am a little bit rusty on that now. As I recall, at times in my experimental work, in using copperized clay, I believe we had trouble with color.

[fol. 457] Q. Isn't it a fact that in addition to the difficulty in regenerating the copper and in the cost, that a large percentage of the copper was actually lost and could not be accounted for?

A. I think we had some indications of that. I am not absolutely positive of it.

Mr. Glasser: I believe that is all, unless Mr. McKeever has some other thought.

Mr. McKeever: No, that is all.

Mr. Marsh: No redirect.

Stipulation.

It is hereby stipulated by and between counsel appearing at the taking of the deposition of Thomas T. Gray, that the signature of the witness to the deposition is waived.

(Whereupon at 1.00 P. M. the deposition was closed.)

State of New York,
*County of New York, ss:*

I, Charilaus G. C. Raphael, a Notary Public in and for said County and State, do- commissioned and qualified and authorized to administer oaths and to take and certify depositions, do hereby certify that persuant to the fore-

going notice and stipulation issued and served in the civil cause in the United States District Court for the District of Maine, Southern Division, wherein Gasoline Products Company, Inc., is plaintiff, and Champlin Refining Company is defendant, I was attended at the office of Messrs. Taylor, Blanc, Capron & Marsh, 22 William Street, in the Borough of Manhattan, City, County and State of New York, by John B. Marsh, counsel for the said plaintiff, and also by Horace G. McKeever, and H. O. Glasser, counsel for the said defendant, on the date hereinabove stated; that the aforsaid witness, Thomas T. Gray, who was of sound mind and lawful age, was by me first carefully examined and cautioned and duly sworn to testify the truth, the whole truth and nothing but the truth; and he thereupon testified as is above shown and that the deposition as above set forth, was, with the consent of the respective counsel and [fol. 458] under my supervision, taken down in shorthand by John A. Butler, a competent shorthand reporter, and thereafter caused to be transcribed into typewriting; that the signature of said deposition by the witness was waived by counsel for the respective parties; that said deposition is herewith filed by me with the Clerk of the United States District Court for the District of Maine, Southern Division; and it being impracticable for me to deliver said deposition and the exhibits thereto attached with my own hand into the Court for which it was taken, I have retained the same for the purpose of being sealed up and directed with my own hand and speedily and safely transmitted to the said court for which it was taken and to remain under my seal until there opened.

I further certify that the reason for the taking of said deposition was, and is, and the fact was, and is, that said deponent lives at Elizabeth, New Jersey, more than 100 miles from the place where the said civil cause is appointed by law to be tried.

I further certify that I am not related to any of the parties, nor have I any interest whatever in the outcome of the subject matter of the cause aforesaid.

In witness whereof, I have hereunto set my hand and affixed my notarial seal, at New York City, N. Y., in said County and State, this 20th day of April, 1929.

C. G. C. Raphael, Notary Public. (L. S.)

Dr. Roy Cross, a witness for plaintiff, having been duly sworn, testified:

Direct examination.

By Mr. Marsh:

Q. You are one of the brothers that have been referred to at numerous times in this testimony, are you not?

A. Yes.

Q. You reside where?

A. Kansas City, Missouri.

Q. Will you state briefly your professional education and your experience in the oil industry?

A. I am a graduate of the University of Kansas. I have [fol. 459] been connected with the Kansas City testing laboratory as director for twenty-one years; with the Los Angeles testing laboratory as president for five years. I am a member of the American Petroleum Institute; American Society for testing materials; American Chemical Society; American Institute of Chemical Engineers, and the similar technical societies. I have practiced chemical engineering; made chemical analyses for the last twenty-four years, and I have paid particular attention to the chemistry of petroleum and its products.

Q. Now, Dr. Cross, you have made a number of inventions, have you not, some of which have been patented?

A. Yes.

Q. And have some of those related to the oil industry?

A. Yes.

Q. Have you had occasion in connection with your professional career to advise oil refiners as to operating problems as well as chemistry?

A. Yes; we have had several hundred refining companies and oil companies as our clients, and acted for them in an advisory capacity relative to refining of petroleum and the use of petroleum products.

Q. Have you also been consulted with reference to marketing of different petroleum products?

A. Yes.

Q. In a practical way?

A. Yes, sir.

Q. Dr. Cross, are you familiar with the type of refinery equipment that is now installed in the Champlin Refining Company? I refer in that question both to the skimming plant as has been described in this testimony, and the cracking plant?

A. I am familiar with that type of refining equipment. I have never seen the equipment in the Champlin Refining Company, however.

Q. You are familiar, however, with the so-called standard Cross cracking plant?

A. Yes.

Mr. Marsh: I think it would be an advantage, Your Honor; to ask Dr. Cross to describe very briefly here the operation of the Cross cracking plant, and what product goes in and what product comes out, and then these supplementary fractionating processes.

The Court: I think it would be very desirable.

[fol. 460] By Mr. Marsh:

Q. Will you sketch that out very briefly and simply for us?

A. In the refining of petroleum as it comes from the ground the first step is simply a physical separation of the various components. Ordinarily the ones with which most of us are familiar, and which are the ordinary constituents to be separated, are gasoline, coal oil, distillate or gas oil and fuel oil. In the distilling of this crude oil just as it comes from the ground the first product which is vaporized upon heating the oil in a tank is the gasoline. When the temperature in this tank has been brought up to about four hundred and thirty or four hundred and thirty-five degrees Fahrenheit all the gasoline has been distilled off. If the fire is continued, the next thing to come off is coal oil. That properly comes off to a temperature of say six hundred; close to six hundred degrees Fahrenheit. Of course these things will vary somewhat with the practice of the particular refinery and the products that are most salable. The next product to come off is a distillate of some character. It is the type of distillate which you burn in the oil heater for fuel oil in your home, or it is sometimes referred to as gas oil, the product which is used in the manufacture of artificial gas in towns and cities. The material

left in this tank, commonly spoken of as fuel oil, is the residue. The most valuable product, of course, is the gasoline; and in the last five or six years there has not been enough crude oil produced to supply all the needs for gasoline at the rate the consumption has been increasing. If at this moment we depended upon the natural distillation of the crude oil we would have sufficient gasoline to supply about sixty or sixty-five per cent of the requirements; so that these heavier oils, that is, corresponding to coal oil, to gas oil and to fuel oil, have been treated by high temperature, and possibly high pressure as well, to produce more gasoline, and this treatment has effected an additional production of something like thirty-five per cent of the requirements for automobiles.

Now various types of cracking processes have been worked out. The Cross process, in short, consists of taking some of these heavy residues and these cheaper prod- [fol. 461] ucts—from the crude oil—these ordinary products which have no gasoline, cannot be separated by the ordinary distillation, and by heating the pipes at a high pressure,—in the Cross process a pressure of six hundred pounds ordinarily, or above,—the oil continuously passes through these pipes and gradually raised to the temperature of nearly nine hundred degrees Fahrenheit or thereabouts. It then passes into a large drum or reaction chamber the purpose of which is to give a longer period of time for the decomposition of the oil to go on; and in this decomposition the heavy oil molecules—particles that constitute the heavy oil—are decomposed; some are built up and some are decomposed, so that we have a product which, so far as the quantity of gasoline, kerosene, coal oil, gas oil and fuel oil is concerned, is very much the same as the product that comes out of the ground. And for that reason when this product is cooled, as by sending through a coil in a condenser, it is called synthetic crude oil—artificial crude oil—and it is made by the decomposition of the heavier oils to make an artificial crude oil, and for that reason the trade sometimes—commonly—speaks of it as synthetic crude oil. Now, this synthetic crude oil, of course, can be treated in exactly the same way as ordinary crude oil as it comes from the ground; it can be heated again and the various components distilled off, just as they

are distilled off in the ordinary skimming plant. So that though the making of the synthetic crude is an essential of the Cross process, the process itself has developed further in that the attempt has been made to save the heat that has been put into the oil when it is decomposed for the purpose of distilling, without the need of again firing it and again putting it into other stills, so that the next step was to use that heat—that self-contained heat so-called—to do the distillation of the crude oil itself—or the synthetic crude oil itself—and after the oil, then, had been passed through the coil it was introduced into a large steel drum known as a vaporizer, and there from its own heat something like ninety per cent of the oil would be converted into vapor and [fol. 462] be distilled. This vapor, however, would contain the gasoline and coal oil and the gas oil of the distillate, so that some of it had to be cooled to allow the gasoline alone to pass over into a separate condenser. Various methods were used to do that. One was to use the coil in a drum just following the vaporizer whereby the kerosene and gas oil could be separated out at the bottom, and that could be run into the tank and run back into the coils for cracking again. Early in the development of the Cross process, however, a fractionating equipment—that is, equipment which would cause all of the gasoline to go out and none of it to be retained and none of the kerosene and coil oil to go out and all of it to be retained—wasn't highly developed, so that there was produced under the first attempts to make finished gasoline by the self-contained heat a product which has been termed pressure distillate or synthetic benzine, which means that it is a very poorly refined gasoline, a gasoline which at that time was only about seventy per cent pure. The next step was to put on—after this vaporizing tank—what is known as a very efficient fractionating tower, known also as a bubble tower, which contained a series of pans, in which pans were pools of oil, and the vapors were allowed to bubble through these pools of oil so that nothing but the gasoline would go through. In this so-called bubble tower it was possible to produce an end point gasoline. That is, a gasoline which had all of the vaporizing qualities and all of the essential qualities of gasoline ready to go into the motor car. However, it had certain impurities, such as higher sulphur con-

tent, which may or may not be necessary to remove. In short, this was the type of plant which the Champlin Refining Company installed.

Mr. McKeever: Now, right there, Dr. Cross, Mr. Marsh and I have agreed that there may be exhibited to the jury some very fine photographs that wouldn't be of this plant, of course, but would give the jury an idea. We have two copies of this book containing these photographs, and I would like Dr. Cross to take it and pick out one he thinks is the best example of a picture of one of these units. It is simply for the purpose of giving the jury an idea of what the plants are like that he has described.

[fol. 463] The Court: Yes. That's all right.

The Witness: These all have the Gray tower, Mr. McKeever.

Mr. McKeever: Have they?

The Witness: Yes. This (indicating) would be the best representative.

Q. What is that?

A. That is the Gray tower.

Q. Now, Dr. Cross, just take that and hold it up to the jury, sir, and show them what the cracking unit is on that picture, and what the Gray tower is. What part of that is the tower?

Mr. Marsh: I am afraid those pictures are pretty much confined to the treating towers.

The Witness: The treating towers show in a predominant way.

Mr. Marsh: Which number are you using, Doctor?

A. I am using 18-F. In this, the structure which you see at the right of the smoke stacks is the furnace in which there are coils of pipe running back and forth. The oil is pumped into this furnace and goes at a high rate of speed through these coils. This is the furnace. (Witness leaves stand and indicates different parts of photograph to the jury.) That oil comes through, first, the furnace; through these coils, and is heated to a temperature so that when it gets into this steel drum it has a temperature not far from nine hundred degrees; possibly a little less than nine hundred degrees. Then it passes—all of this is under pressure; in this case of six hundred pounds or more to the square inch.

Q. Pardon me. Now, if you will just stand over this way

at this angle, that will bring you so that all the jurymen can see you and know what part of the picture you are referring to, I think. (Witness leaves stand and takes position in front of and at one end of jury box.)

A. (Continued:) In this vaporizer chamber the pressure is released but not entirely; it is released say to not ordinarily exceed fifty pounds per square inch, from the original pressure of six hundred pounds per square inch. So it largely turns into vapor. If it has not already vaporized it now passes into vapor in the vaporizing chamber. The [fol. 464] vapors pass up out of the large pipe at the top into this bubble tower. In this bubble tower are a series of cast iron pans on the top of which are bubble caps that have small slits on the sides. The vapors pass through the tops and under these bubble caps and are scrubbed by the oil that is passed down the pans. The vapor then, when it reaches the top of the tower, is practically pure gasoline, together with some gas oil that will not condense by cooling. It then passes out into the condenser box, in the case of the average plant. But in the case of a vapor phase treating tower it passes into the—through the coil in the tower—which is shown on the left hand side of the photograph 18-F. From there it then passes back into the cooling box.

Q. Now, that picture was a picture of a Cross cracking plant, was it, Doctor?

A. That was a picture of a Cross cracking plant with a Gray filter tower attached to it. Apparently the Barnsdall plant.

Q Now, you spoke in your description of the gradual development of the Cross process of the synthetic crude. Will you tell me when it was that the plant was developed so as to carry beyond that stage the manufacturing of synthetic crude? Do you remember approximately?

A. It was about May, 1925.

Q. But it was later than 1923?

A. Yes.

Q. Now, in the course of your work at the Kansas City laboratories, did you have occasion to make a study of price trends and prices of various other companies?

A. Yes.

Q. Referring now to the year 1926, did your studies indicate any comparison as between the prices of straight run gasoline and cracked gasoline; that is, properly treated, merchantable, cracked gasoline?

A. In 1926 the market at the refinery in general was higher for straight run gasoline than for cracked gasoline.

Q. By about what margin, if you remember?

A. Ordinarily by about a quarter of a cent. In some instances, as much as half a cent.

Q. Were there any concrete instances where that was brought to your attention?

A. Yes.

[fol. 465] Q. Will you refer to them?

A. A client in Kansas City,—the Benzol Gas Company——

Mr. McKeever: I object.

The Court: I think you had better omit his specifications.

Q. Did these conditions also apply to the retail sales in all cases?

A. No, they didn't. In many cases retail sales were made at a premium. Cracked gasoline is often sold at a premium in retail sales.

Q What occasioned that condition, do you suppose?

A. This was a period at which anti-knock gasoline was developing, and there were certain distributors who were advertising extensively a premium gasoline, and were actually selling it at a price of ordinarily three cents per gallon above the market.

Q. Did this advantage reach the manufacturers of gasoline, Dr. Cross? If you know?

A. Not at that time; 1926.

Q. I am referring to 1926. Has that condition continued or has there been a gradual change?

A. There has been a gradual change.

Q. What is the condition now?

(Objected to by Mr. McKeever.)

Mr. McKeever: We object to the condition now.

The Court: I don't think it is important.

Mr. Marsh: No, I simply wanted to complete the story.

Mr. McKeever: I will let him answer.

The Court: It might be interesting to know.

Mr. McKeever: For that purpose, I shall not object.

Mr. Marsh: I simply want to complete the story. I don't think it has any bearing on the case.

A. At this time cracked gasoline is at a premium by most refineries.

Q. Now I hand you the Defendant's Exhibit 64 which is a table graph showing the prices of Champlin's straight run gasoline for a period by years from 1925 to 1929, compared with the Champlin Refining Company market quotations both for spot and for bulk sales, and ask you to state what that graph shows as to the relative prices obtained by the [fol. 466] Champlin Refining for their straight run gasoline and what they show as the average price?

Mr. McKeever: Is this for the purpose of laying a foundation for another question?

Mr. Marsh: Yes.

Mr. McKeever: Of course a repetition of the——

The Court: Yes.

Mr. McKeever: That graph itself shows.

The Court: He is laying a foundation.

Mr. McKeever: All right.

A. That shows the Champlin sales price to be somewhat above the spot market quotation.

Q. The spot market quotation would compare to the hand-book price that has been referred to?

A. Yes.

Q. Then having in mind what you have just testified to as to the relative bulk sale price of cracked gasoline and straight run gasoline in 1926, will you state what this chart here would indicate as to the comparative prices obtainable for cracked gasoline manufactured by Champlin and for their straight run gasoline?

A. At that time the general market on cracked gasoline would have been even lower than the hand-book price or Champlin price.

Q. Now I hand you Defendant's Exhibit 63, which relates, I believe, again to the straight run gasoline, does it not, Mr. McKeever? To the sales during and inventoried at the end of each month, stated in gallons. Will you state, Dr. Cross, what that indicates as to the seasonal trend of their sales and of their stock?

A. That shows the trend in the—shows that the trend in the Champlin Refinery Company was very much the same as was found in the industry. That is, the sales were very much larger in the consuming months, the summer months, and very much smaller in the storing months or winter months.

Q. How in reference to stocks on hand?

A. The stocks on hand of course being the reverse of the sales. That is, the stocks on hand increase greatly on the non-consuming months and decrease in the consuming months.

[fol. 467] Q. Will you state for the information of the jury what you refer to as the non-consuming months?

A. The winter months. That is, only comparatively speaking. As a general thing, the consumption during the winter of gasoline lags from two to three months. So that, in other words, it is necessary to store about an average two or three months gasoline production to take care of the increased demand in the summer-time.

Q. Mr. Leverton testified at page 466 of his transcript that the cracked gasoline in storage at the Champlin plant on April 1, 1926, was 6,746,376 gallons. Can you state from Exhibit 63 the approximate amount of straight run that was in storage on the same date, April 1, 1927, I think it is.

A. Approximately 6,700,000—6,800,000 in round numbers.

Q. Making a total of both types of gasoline of how much?

A. I don't remember that other figure.

Q. 6,746——

A. Approximately 13,500,000.

Q. Now will you compare that total with the total at the same date in 1926 and in 1928 as appears upon Defendant's Exhibit 63?

A. 1926 and 1928?

Q. Yes. This is 1927 you are speaking of?

A. In 1926 the straight run gasoline was about 6,900,000. Slightly more than 1927.

Q. Of course the chart does not show the cracked gasoline for 1928?

A. No.

Q. So you can't make that comparison. Now if the Champlin Refining Company had sold the 6,700,000 odd gallons of straight run gasoline which it had stored on April 1, 1927, they would have had still according to the testimony of Mr. Leverton 6,700,000 gallons of cracked gasoline. Will you state how that would have compared with the stock in 1926?

A. That would have been slightly less than the stock of straight run in 1926.

Q. How would it compare with the stock of straight run in 1928 as indicated upon Defendant's Exhibit 63?

A. Approximately the same. A little more than the stock in 1928.

[fol. 468] Q. Now will you compare the sales indicated on Exhibit 63, sales of straight run, for the period from December, 1926, to April, 1927, with those from December, 1925, to April, 1926? You have made a rough computation, have you not?

A. The sales were considerably higher during the winter of 1926-27 compared with 1925-26, the difference being approximately 7,000,000 gallons more in 1926-7 than 1925-6.

Q. Dr. Cross, have you prepared a chart based on the oil price hand-book showing the price trend of straight run gasoline during 1922 to 1926, inclusive?

A. I have a chart based on the prices, but these are not the price hand-book. These are from the Oil and Gas Journal.

Q. From the Oil and Gas Journal. I will ask to have this chart marked as Plaintiff's Exhibit K. (So marked.) Now, taking that chart will you state what that indicates as to the seasonal price movement of straight run gasoline?

Mr. McKeever: For what time?

Mr. Marsh: During the period covered by the chart, from 1922 to 1927, is it?

The Court: 1926?

Mr. Marsh: I should have said 1927.

A. To the latter part of 1927.

Mr. Marsh: Yes.

Mr. McKeever: It goes back beyond any period involved here, if the Court please, but it is part of story of the industry.

Mr. Marsh: It is a companion to this chart.

Mr. McKeever: Yes; we have no objection.

A. That chart shows the seasonal fluctuation on the price of gasoline as given by the Oil and Gas Journal, shows the normal rise beginning with 1923, and the price the first part of the year in anticipation of the increased demand during the summer months. Then the increased demand can be estimated, and here it is falling off, the price falls, and that represents itself not exactly the same but very much the same in 1923, 1924, 1925 and 1926. In 1926, the latter part, we have the same tendency to rise in the latter part of the [fol. 469] year, in December, in anticipation of the usual increased demand, but instead of rising we have the excep-

tional position of the price continuing to fall immediately after the first of the year in 1927. Entirely contrary to the behavior for the preceding five years.

Q. I will offer Plaintiff's Exhibit K in evidence. Dr. Cross, counsel for the defendant has asked that you explain the writing on the end of this exhibit?

A. The writing at the left end is referring to the tank car price per gallon Group 3, Oklahoma, that is, Oklahoma Refineries, in cents per gallon. The writing at the bottom of the exhibit shows the period of time covered. Three months.

Q. Each little square is a three-months period, is it not?

A. Yes, sir.

Q. In other words, the time runs evenly across the face of the chart?

A. That is correct.

Q. I hand you now, Dr. Cross, a copy of Defendant's Exhibit No. 61, which is entitled guaranteed yield hand-book prices—this is a tabulation which has been referred to in the testimony a number of times.

Mr. McKeever: Exhibit—what is that?

A. No. 61.

Mr. McKeever: Exhibit 61.

Q. Now, Dr. Cross, did you compare the prices appearing in the fourth line or the third line as the hand-book price of gasoline with the hand-book to see what type of gasoline those prices were referring to?

A. Yes, sir.

Q. Will you state what that was?

A. Those prices referred to 58-60, U. S. Motor gasoline, 437 end point.

Q. Now have you with you a statement of what the U. S. Gasoline is, the specifications of U. S. gasoline?

A. I know what they are.

Q. Will you state what they are?

A. The U. S. Motor Gasoline is gasoline having an end point below 437 degrees Fahrenheit. It must begin to boil at a temperature below 131 degrees Fahrenheit. 20% [fol. 470] must have been distilled at a temperature of 221 degrees Fahrenheit. 50% must have been distilled at a temperature of 284 degrees Fahrenheit, and 90% must have been distilled at a temperature of 392 degrees Fahrenheit. In addition, it must not contain more than one-tenth

of one per cent of sulphur, and it must not be corrosive to copper according to an arbitrary method of testing.

Q. Will you state now whether the gasoline manufactured by the Champlin Refining Company in their Cross cracking units would make a gasoline of that type?

A. It would not.

Q. Well, would it, assuming the addition of a treating tower like the Gray?

A. It would not.

Q. What would be still lacking in conformity with the specifications which you have just related?

A. It would not pass the test for percentage of sulphur. It would not pass the copper corrosion test. And, if 437 end point gasoline were made, it would not pass the intermediate distilling temperature at 90 per cent. It might or might not pass the 50% test.

Q. Mr. Peppers testified as to the types of crude which were used by the Champlin Refining Company during the period of 1926. I think he described them on Page 295 of the Transcript as Tonkawa, Watchorn, Billings and Garber, all of which he said were Oklahoma crudes. Will you state what the sulphur content of those crudes is?

A. The sulphur content of the crudes is very low. Gasoline, however, cracked from those crudes will contain about seventeen one-hundredths of a per cent of sulphur.

Q. That would be in excess of the amount required by the U. S. specifications?

A. Yes.

Q. Would it be accurate to apply the hand-book prices to a gasoline of that type?

A. It would not.

Q. U. S. 58-60?

A. The hand-book price would not apply to a gasoline of that type.

Q. Will you state what it would be necessary to do to that gasoline to make it conform to the U. S. Gasoline 58-60, and what would be the cost of doing whatever had to be done?

[fol. 471] A. In the first place it would be necessary to operate the cracking plant so that a lower end point gasoline was obtained. Instead of a 437 end point, the gasoline would have to have an end point of approximately 410 to 415—possibly 412.

Q. Would that affect the yield?

A. That would materially reduce the yield.

Q. How much?

A. Probably close to ten per cent.

Q. Would that yield be lost or would that ten per cent appear in some other part of the operation?

A. That would go back as re-cycled stock or as charging stock. It would reduce the amount of charging stock slightly.

Q. In other words, there would be a loss of value there of between whatever it was here, nine cents, and four cents and a fraction?

A. There would be a loss of value, yes.

Q. As to that ten per cent?

A. Yes.

Q. Not a total loss. What else would be necessary? I am afraid I interrupted you—in order to make this gasoline conform to U. S. specification?

A. It would be necessary to treat to remove the sulphur.

Q. How would that be done?

A. This would be normally done by treating with sulphuric acid and redistilling.

Q. It would have to be acid-treated and re-run—is that the expression?

A. Yes.

Q. Will you state approximately what the cost per barrel that would be of gasoline?

A. The total cost would amount to about twelve and a half cents a barrel.

Q. So that if you are to use U. S. Gasoline, 58-60, in making up such a computation as this, it would be necessary to deduct this additional expense, would it not, and this loss of volume?

A. Yes. I mean 58-60 U. S. Motor.

Q. U. S. Motor, that is what I mean. Dr. Cross, you have heard the testimony in this case, and I wish you would go back to the situation at the Champlin Refining Company as it existed, we will say, in August or early September of 1926, when the cracking plant was about to be completed [fol. 472] and no treating apparatus had as yet been installed—we will say a time before the treating apparatus was installed—and when it became apparent there would be a large volume or the volume which has been testified

to here of cracked gasoline which required treatment, and I will ask you to relate to the jury the various methods in which it would have been feasible in your opinion to treat that gasoline, stating as to each what the approximate cost would be, either for the installation of additional equipment or for treating cost? Possibly it would be well to number these methods as you take them up.

Mr. McKeever: Now, if the Court please, I think that question possibly is objectionable on the ground that the only thing he can prove by this witness would have to be based necessarily upon a hypothetical question. Now, if he is going to ask him that question, his question should include the condition that existed there at that time, and, while he did refer to the testimony that has been gone over, I would insist that this witness state what condition he has in mind that existed there when he goes to make his conclusion.

The Court: He may, and doubtless will specify in detail what condition he uses as a hypothesis.

A. I am assuming that a cracking plant of the same type as that used at the Champlin Refining Company is ready to operate and that the crude oils, etc., in the testimony are being used for making stock for the cracking plant, and that the cracking plant has no treating apparatus attached to it. In such case there are a number of different methods which could be pursued, the first of which would be possibly to not treat at all or as little as possible. It should be borne in mind that this plant was producing or was ready to produce gasoline which is practically, so far as the operation of a motor is concerned, finished gasoline. The main objection to it is one that does not enter into the operation of the motor. It is rather a matter of odor and possibly color. The color being approximately 17—only 17—which is not a dark color. It is almost a water-white color. So the obvious thing for the average refiner to have done would be to sell the gasoline with as little expense in treating as possible, and he could have [fol. 473] done in this case what other refiners have done under the same circumstances, that is, merely sweetened——

Mr. McKeever: Just a moment, if the Court please, what other refiners have done under the same circumstances——

The Court: I think that may be objectionable.

Mr. Marsh: I think I have qualified Dr. Cross, and I can show, if you desire or if you thing it is necessary, as a foundation to these questions, that he has been employed by other refiners to advise on just exactly such situations as this, and that he is amply qualified.

The Court: That will help to enlarge his knowledge and increase his usefulness as an expert, but to give the details of these other plants would lead us into other issues, which would be useless.

Mr. Marsh: I can qualify him by simply asking him if he has dealt with problems of this kind.

The Court: I am quite clear that he should leave out any statements as to what other plants have done. It makes for too complicated issues.

Mr. Glasser: If the Court please, I would like to make one further suggestion. Dr. Cross is now about to talk about a change in a long established policy, which is not a technical proposition at all, but involves the question of the policy of the operation of this business. That is certainly objectionable from the standpoint of any expert testimony.

The Court: As an expert, he is going to state his opinion as to what could be done in that situation, having that quantity of oil on hand, and it would be useful information.

Mr. Glasser: But he predicates it upon the change in policy in the marketing of an inferior product which he frankly states is an inferior product.

The Court: That can be used by you when you question him in regard to it.

By Mr. Marsh:

Q. Doctor, will you proceed from where you were when you left off, treating this as a problem of the Champlin Re-[fol. 474] fining Company without reference to how you may have advised other refiners?

Mr. Marsh (to the Reporter): Will you read the last of the Doctor's testimony? (Answer read by Reporter.)

The Court: That last should be stricken out.

A. The gasoline coming from the cracking plant, assuming it to be 437 degrees Fahrenheit end point would,

of course, not pass the U. S. motor specifications, but it may have been treated merely by sweetening, that is, by treating preferably with caustic soda and litharge, what has been spoken of as the doctor solution. This sweetening removes the obnoxious odor. Then this gasoline, which has a fairly good color, might have been mixed with the much larger amount of straight run gasoline. In this refinery it is presumed from these crudes that with a capacity of 14,000 barrels there would be available something like 6,000 barrels of straight run gasoline, so that the amount coming from the cracking plant, one thousand to fourteen hundred barrels, when mixed with the approximately five times the volume of straight run would give a product which would comply with any of the ordinary standards, and, if the cracking plant were operated to produce U. S. motor gasoline, or having a distillation range of U. S. motor gasoline, then the mixed product would be U. S. motor gasoline and should command essentially the same price.

Q. What additional cost for apparatus would have been involved in such a mixing or blending operation?

A. The only thing required would have been a sweetening or treating plant of that type which would cost approximately five thousand dollars at the outside.

Q. Would there be any extra tankage involved?

A. There might be extra tankage. That would depend upon the facilities of the refinery itself.

Q. What would be a maximum cost on that?

A. Why, I would say if you had a couple days' storage it would be a couple thousand dollars extra.

[fol. 475] Q. Then what would be the expense per barrel of gasoline in this sweetening by the doctor solution that you have referred to?

A. It would not exceed two cents per barrel.

Q. How long would it have taken to procure that apparatus that you refer to?

A. Why equipment of that sort is usually available around a refinery; but two weeks should have been ample.

Q. What would be the total cost of this treatment for the one hundred and seventy odd thousand barrels that were involved in this Table 61?

A. The cost would be about thirty-four hundred dollars.

Q. So that the maximum outlay there would have been the $3,400 plus the $2,000 tankage, plus the five or six

thousand dollars that you estimated for supplementary equipment?

A. Yes.

Q. A total of what? Not over ten thousand dollars? Would that procedure have permitted, or will you state whether or not it would have permitted the cracking plant to have been operated continuously from the time of installation?

A. Yes, it would.

Q. Now, will you state other methods that were available under the conditions which you have assumed to treat this unfinished gasoline?

A. Treatment could have been effected by the normal sulphuric acid method.

Q. What would have been involved in the way of additional apparatus there?

A. It would have to be put in if it did not already exist; some type of acid treating plant.

Q. What would be the cost of that?

A. A continuous plant could have been put in for the acid treatment alone for around fifteen thousand dollars.

Q. Do you include in that the cost of an additional still?

A. No.

Q. How would you have provided for the still?

A. The distillation could have been effected by introducing into the natural crude oil after treating with the acid—the cracked gasoline could have been introduced into the crude oil.

Q. How much would that have amounted to in quantity per day?

A. Oh, twelve hundred barrels per day.

[fol. 476] Q. Would there have been any other way of treating the cracked gasoline with the apparatus available at the plant?

A. I don't know whether the apparatus was available at the plant.

Q. With reference to the fourteen thousand barrels of crude stills?

A. If the capacity at the plant were in full use it would possibly have been necessary to slightly cut the crude runs; but cutting the crude runs twenty-five hundred or three thousand barrels under any circumstances would have

given ample capacity for re-running the cracked gasoline.

Q. That would have involved the storage of the crude that would otherwise have been run to the crude still?

A. That would have involved the disposal of the crude in some manner if the distilling capacity were not available.

Q. On the price ranges for crude from the 15th of September, 1926; to along in March, 1927, would the disposal of that crude monthly have involved any loss?

A. Theoretically not. I don't know what the exact facts were in this case.

Q. Did the price of crude oil fall off as rapidly during that period as the price of gasoline?

A. I haven't the prices of crude before me.

Q. Now, Dr. Cross, you have not testified with reference to the Cross liquid phase treating system which has been mentioned in this testimony. Would that have been available?

A. Yes.

Q. What installation cost for additional equipment would be involved in using that process?

A. The installation cost of the Cross liquid phase treating plant at that time would have been about twenty to twenty-five thousand dollars to handle twelve hundred barrels per day.

Q. You are speaking of twelve hundred barrels in reference to the actual output of the Cross cracking units?

A. Yes.

Q. How long would it have taken to have gotten that installed?

A. About six weeks.

Q. What would be the treating cost per barrel of unfinished gasoline by that method?

A. About eight cents a barrel.

[fol. 477] Q. You have not referred to the Gray process?

A. The Gray Process could also have been used.

Q. Have you any information as to that, other than what you have from the deposition that was read this morning?

A. Yes; I had the information as of that date. I don't have it up to date; but at that time the Gray process, as I had investigated it, could have been operated at about ten cents per barrel including royalty.

Q. And then what would have been the installation cost?

A. As I remember, about thirty thousand dollars.

Q. That is somewhat more than Mr. Gray estimated in his deposition?

A. Yes; different from the deposition.

Q. And the time which would have been required to install that apparatus?

A. About two months.

Q. Based on your laboratory experience with this copperized clay treatment, would it have been feasible, or what would have been the cost I will say, to treat this gasoline by using copperized clay in the type of towers that were actually installed by the Champlin Refining Company?

A. I am not exactly familiar with the Champlin Refining Company's towers, the way they were put in; but a tower could have been installed according to my information at that time, so that the cost of treating would have been approximately thirteen and one-half cents per barrel.

Q. In making that estimate do you allow for recovery of the copper?

A. No; that does not allow for the recovery of the copper, and assumes the same consumption of clay and copper that was found on small scale laboratory operation.

Q. Would the amount of the copper required be affected by the type of crude oil that was run?

A. That is one of the main considerations. The higher the sulphur content the greater the amount of copper, because the purpose of the copper was to remove sulphur.

Q. What price per pound are you assuming for the copper in making that estimate?

A. At that time the copper was about twenty cents a pound, I believe.

[fol. 478] Q. And are you assuming the use of the bright copper or——

A. I am assuming the use of the copper scale which is obtained as a by-product of rolling mills, that being the cheapest type of copper.

Q. Would the price of that be about the same?

A. About the same, yes.

Q. Were you here when Mr. Pepper testified as to the blending operation that he tried on this Cross cracked gasoline?

A. Yes.

Q. Did you hear his testimony?

A. Yes.

Q. Can you state why it was that the blending operation was not successful?

A. I can't state positively. I don't know that I understood exactly what he was doing. I prefer not to say positively.

Q. I will ask you this question: Assuming a cracked gasoline that has been sweetened by the chlorination process, would it be possible to blend that in the manner which you have described with straight run gasoline and get a U. S. gasoline?

A. No; ordinarily it is not safe to blend two products when one of these products has been treated with chlorin. It usually isn't successful.

Q. What would be the result?

A. Ordinarily the result is to obtain a gasoline which either does not pass the doctor test or the copper corrosion test; usually the latter.

Q. If instead of having treated your gasoline or unfinished gasoline with the chlorination process, it had been treated with the doctor solution, then as I understand from your testimony that difficulty would not have arisen?

A. I don't think so.

Q. That is the solution that you proposed?

A. Yes; that would have been successful if you had used the doctor test.

Q. And can you compare the cost of the apparatus required to use the doctor solution with the apparatus required for the chlorination treatment?

A. About the same cost. That is, they both cost about the same.

Q. What would that amount to?

A. Around five thousand dollars.

[fol. 479] Q. And the cost per barrel for the treating by those two methods. Will you compare those?

A. About the same. The cost depends to some degree upon the character of the product treated, of course.

Q. Dr. Cross, if any of the five methods which you have described had been adopted, would there have been any necessity, in your opinion, for re-running any of the cracked gasoline through the cracking plant, as was done in this case, according to the testimony?

Mr. McKeever: Will the reporter please read the last part of that question? (Pending question read by reporter.)

A. There would not.

Q. How long would it take, in your opinion, to re-run 170,000 barrels of the unfinished Cross cracked gasoline through the two 2000-barrel Cross cracking units at the Champlin Refining Company?

A. I believe it could have been done in about two months.

Q. You are assuming what rate per day, per unit?

A. That assumes about close to 1700 barrels a day.

Q. Now, Dr. Cross, in order to re-run that gasoline and handle it properly, would there have been any necessity for additional fractionating equipment, additional to what was installed in connection with the cracking units?

A. Not if you are running it through the cracking plant.

Q. What?

A. Not if run through the cracking plant.

Q. Would there have been any necessity for any additional condensing equipment?

A. No. No additional surface condensing. But the circulation would have had to have been increased to some extent.

Q. Would that have involved any substantial additional cost?

A. No substantial cost.

Q. Can you state in dollars what it would be?

A. I don't think there would have been any additional cost.

Q. Would it have been necessary to cut out your reaction chamber from that operation?

A. No. It wouldn't.

[fol. 480] Q. It wouldn't?

A. No.

Mr. Marsh: I think that is all.

Mr. Glasser: If Your Honor please, the testimony of this witness has been highly technical, and we would like to have about ten to fifteen minutes recess before we start on our cross examination.

The Court: Certainly. We will take a recess, gentlemen, of ten or fifteen minutes.

(Recess at 3.50 standard time.)

Cross-examination.

By Mr. Glasser:

Q. Doctor, your training has been highly technical, has it not?

A. Practically. I have had some business experience.

Q. I am referring now to the marketing and refining of crude oil?

A. My work has been in conjunction with distributing companies, for example, in regard to the marketing, and it has been largely technical, that is correct.

Q. You have been for a good many years conducting the laboratory at Kansas City and your connection with that of course has been making analyses, as you have testified?

A. Analyses and consultations. The largest part of our business is consultations.

Q. I believe you said that you had not made an inspection of the Champlin plant?

A. No, I have never seen the Champlin plant.

Q. Were you familiar with the Mid-Continent plant at Tulsa during the period of time in question?

A. No.

Q. Are you familiar with the Barnsdall plant at Barnsdall, Oklahoma?

A. No, except in a very general way.

Q. Were you familiar with the Marland plant at Ponca City?

A. No.

Q. What refineries in the Mid-Continent field did you have personal knowledge of during the time in question?

A. I have visited a number of different plants. I never [fol. 481] worked with the refinery operations except in consultation. I was associated with the Simms Oil Company in Dallas.

Q. What was the capacity of the plant?

A. The cracking capacity?

Q. No, the straight run.

A. About 5000 barrels per day.

Q. What crude did the Simms plant use?

A. At that time they used crude from Northern Texas.

Q. Considerable difference between the Texas crude and the Oklahoma crude?

A. No, the Northern Texas crude isn't quite so good as the Oklahoma, but very nearly so. You are thinking of West Texas which was very poor, and Southern Texas.

Q. How does the sulphur content of the crude used in the Simms plant compare with the sulphur content of the crude produced at Tonkawa? I will change the question. How does the sulphur content in the crude produced in North Texas compare with the crude produced at Tonkawa and Garber?

A. The Sulphur content of the crude in North Texas is higher than that at Garber and Tonkawa, but Tonkawa and Garber are about the highest grade crude in the Mid-Continent field.

Q. Have you had any experience in examining the Tonkawa and Garber crude for sulphur content?

A. Yes. I think I made the first analysis of the Garber crude that Champlin has made.

Q. What do you say the sulphur content was?

A. It is very low. I would say on the crude itself about six hundredths of one per cent.

Q. Did you know anything about the marketing conditions in Oklahoma at that time, actual conditions?

A. I was familiar with the trade in general.

Q. Well, just what do you mean "in general"?

A. I knew the difficulties with which refiners came to my office on questions of treating, and even of sulphur, and simulating certain grades of gasoline.

Q. Can you give me the name of any major company that consulted with you during that period of time about mar-
[fol. 482] keting conditions?

A. The Standard of Indiana. The Simms Oil Company.

Q. Pardon me. I am referring to the Oklahoma companies.

A. The nearest one to Enid was the Blackwell, the Globe Oil Refining Company.

Q. The Blackwell Oil and Refining Company have practiced your liquid phase treating system, did they not?

A. They have recently put one in.

Q. They were practicing it at that time, were they not?

A. They were not.

Q. Were they contemplating the purchase of it at that time?

A. Not that I know of.

Q. Now, at that time there had only been one liquid phase treating establishment, that was the Simms at Dallas?

A. Yes. The Simms had two plants, one at Dallas and one at Arkansas.

Q. There was no other company in the Mid-Continent field practicing the Cross liquid phase treating system at that time, was there, commercially?

A. I think not.

Q. Now when did the cracked gasoline first enter into the picture in the Mid-Continent field, Doctor?

A. About 1915, I would say.

Q. When did your laboratories and your organization become interested in the matter of this cracking process first?

A. We were first attracted to experiment in 1908. The development of the process on a commercial scale was not attempted until 1916.

Q. When was your first commercial installation?

A. The first real commercial installation was about 1920.

Q. At what place?

A. The Indian Refining Company at Lawrenceville, Ill.

Q. Where was the second installation?

A. The second was at either the Pure Oil Company or the Latonia Refining Company. The Latonia Refinery Company at Latonia, Kentucky, the Pure Oil at Heath, Ohio, and possibly the Roxanna at Wood River, Illinois. They all came about the same time.

[fol. 483] Q. What was it that brought about the installation of the cracking process?

A. We needed some more gasoline.

X Q. In what way?

A. There was an insufficient quantity of gasoline to supply the market.

X Q. Did any other factor enter into the question?

A. Well, at times the high price of crude fuel did enter into the question but that is the same thing, as I take it.

Q. Was there any other time prior to the first insallation of your cracking process that the consumption ever exceeded production?

A. Only for short intervals. That is, the regular thing. During the summer months you understand the consumption normally exceeds normal production.

Q. I am not asking now with reference to seasons. I am asking if at any time—if there was ever a time over any given year that production fell below consumption in the oil industry prior to the installation of the cracking units?

A. I can't specify any particular time.

Q. As a matter of fact, there isn't any, is there?

A. There would be right now if it weren't for the fact that the cracking was extensively practiced.

Q. I am asking you with reference to the time prior to the installation of the first cracking plant commercially?

A. I think those things are automatically taken care of. The prices rose to a very great height. Gasoline is drawn from storage and an effort is made to supply the deficiency, so that there never has been a time when we were short of gasoline.

Q. I am inquiring and make particular reference now to the economical end of the question. I gathered from your answer to Mr. Marsh that there was an intimation that the cracking process was necessary to save the industry. Was that the impression you sought to make?

A. I wasn't speaking of the industry. I was speaking to save the public.

The Court: To save the public was the effect of his answer.

Q. Now what is the primary difference between straight run gasoline and cracked gasoline?

A. Straight run gasoline is slightly different chemically, [fol. 484] contains what is usually known as paraffine hydrocarbons. The cracked gasoline consists largely of paraffine hydrocarbons and it also contains olefines and naphthenes.

Q. Is there any functional difference in the two commodities in a motor in an internal combustion engine?

A. Yes, sir; there is.

Q. Will you explain to the jury, please?

A. I will make my explanation, I will assume that both the cracked gasoline and the straight run come from the same crude.

Q. And on the same specifications?

A. And on the same specifications. The straight run gasoline burns more rapidly which causes a sudden pressure

on the head of th[illegible]ion which results if the compression is sufficient to cause a knock, whereas the cracked gasoline explodes more slowly and it doesn't produce such a knock.

Q. Which in your opinion is the superior fuel for the internal combustion motor?

A. I think the cracked gasoline. I am in the cracking business.

Q. Which of the two fuels demand the greater price?

A. Unfortunately until very recently the straight run gasoline commanded the better price.

Q. Is that true now?

A. No, sir.

Q. Why not?

A. The public has become educated to high compression motors and high compression gasoline.

Q. What was the status of the cracked gasoline business at the time this difficulty arose in the early days of 1926 as to the public's general information about the matter?

A. Some had learned about it and others hadn't.

Q. It was in rather a formative period, was it not?

A. Yes, that is true.

Q. Now were the owners of the various cracking processes undertaking at that time to educate the people as to the value of cracked gasoline?

A. Some were educating the public. The others were educating the refiners to market it. The refiners—they were educated first so they got the gasoline as cheaply as they could.

[fol. 485] Q. What were your activities at that time?

A. Our activities in the education were to try to demonstrate to the refiner the superiority of the cracked gasoline incidentally to the marketing.

Q. I believe in the preparation of this little graph—will you give it to me?

A. I have it here.

Q. You have indicated during the period 1927 on your graph a gradual falling away of the market which I understood you to say was contrary to the trend for the four years previously?

A. Yes. I want to explain, this graph covers a broad period. The small points in here in which there were small fluctuations have not been taken into account. This shows the general trend.

Q. Do you have any opinion or can you advise as to what caused the change indicated there in 1927 from the previous trends?

A. Yes, I have an opinion about it.

Q. Well, what was it?

A. Too much gasoline to be sold.

Q. The question of cracked gasoline or straight run enter into that equation?

A. Yes, very much.

Q. In what respect?

A. Too much cracked gasoline being made.

Q. At that time?

A. Yes.

Q. How many commercial installations of cracking units were there in use at that time, do you know? All processes?

A. I suppose a conservative estimate—wildly guessing, I would say two thousand.

Q. What was the percentage at that time of cracked gasoline as to straight run gasoline in the industry?

A. About I would say about 35 to 40%.

Q. What is the percentage now?

A. It is something over 35%.

Q. The percentage has increased?

A. Yes, sir.

Q. Does the same factor enter into the present price situation?

A. Yes, it does.

Q. In your opinion then, as I understand it, the cracked gasoline has affected the price?

A. It has.

[fol. 486] Q. To the detriment of the straight run gasoline, has it not?

A. Yes, sir.

Q. Is there a seasonal demand reflected in cracked gasoline?

A. No, I don't think any more than gasoline in general.

Q. Well, is there a seasonal demand on straight run gasoline?

A. The same applies to both the cracked and straight run. There is a seasonal demand relatively speaking between winter and summer months.

XQ. Is there any difference in the functioning or the functional operation of the cracked gasoline in cold weather

as distinguished from warm weather in the ordinary motor as we now have it?

A. No great difference. That is a functioning of volatility. If you have the same distillation range, the volatility will be the same on either the cracked or straight run.

X Q. Is there any difference in the use of the straight run gasoline in cold weather as against warm weather, in the ordinary motor as we now have it?

A. In the effect of its use?

X Q. Yes.

A. Yes, there is a difference.

X Q. Which season is the most favorable?

A. More volatile gasolines are demanded in the winter time of course.

X Q. Then there is a stronger demand on the cracked gasoline in the winter time?

A. No; the cracked gasolines are not the more volatile gasolines. As a rule, the reverse is true.

X Q. I am trying to get your answer and not my opinion about the relative seasonal advantages of the two products, if you have any and if there is any?

A. With the distillation range, I wouldn't give either one the advantage as to winter or summer.

X Q. Doctor, do all crudes from a given field, from the different wells, have uniform sulphur content, in your experience?

A. Oh, no, indeed, they do not. The sulphur content in the light crudes will be found in the heavy fractions. You take a crude like Garber with a very large percentage of gasoline. Originally that crude had sixty per cent gasoline. Naturally the sulphur accumulates in the residue. Prac- [fol. 487] tically all the sulphur is in the residue, so that the residue has a comparatively large amount of sulphur, and that is the material from which the cracked gasoline is made.

X Q. In the calculation which you made for Mr. Marsh, in which you estimated what you thought would be the fair cost of the elimination of the sulphur in the Garber crude in this plant, you used, as I remember, a given fraction and you assumed, therefore, that that fraction remained constant throughout the supply from that field, did you not?

A. I assumed that the sulphur was about seventeen one-hundredths of one per cent, which is the amount I have found from experience to be in cracked gasoline made from crudes in that general field.

X Q. And whatever the percentage might vary in any given run of crude, that same variance would be carried through in your answers?

A. In some of the treating processes. In the copper the larger the amount of sulphur, the greater the cost of treating. In other treatments the difference would not be so great.

X Q. Now when you were working on this cracking process, I understood you to say that you didn't have the bubble towers in connection with the process during 1923. Was that correct?

The Court: 1923, you mean?

A. No, we didn't have them in 1923.

X Q. 1923, you did not?

A. We did not.

X Q. When did you put the bubble towers in operation in connection with the process?

A. I said in the direct, I think, 1925. I believe that was 1924, that we first used bubble towers.

X Q. Who designed your bubble towers for you?

A. Mr. Widdell designed the first bubble tower.

X Q. Where was that?

A. That was at the Roxanna Petroleum Company in Wood River, Illinois.

X Q. Were there any improvements designed on that bubble tower?

A. Yes, Mr. Koch later aided in designing them.

X Q. This engineer here?

A. Yes.

X Q. He was in the employ of the Gasoline Products Company?

A. Yes.

[fol 488] X Q. He did that in your laboratory at Kansas City?

A. In our engineering office, yes.

X Q. Was there any patent applied for for that process?

A. Why, yes, there are a number of patents.

X Q. I am talking about this bubble tower now, this improvement that came in 1924 when Mr. Koch was working there. Was there any patent applied for on the bubble tower as he designed it finally?

A. I don't know as to that.

X Q. Now, with reference to the action that might have been taken by the Champlin Company to take care of the situation as they found it in September, will you again now repeat the first process or first arrangement that you suggested on direct examination might have been employed?

A. I don't know as I can give you it in the exact way, but the first one I think was the one which required the sweetening of the cracked gasoline and blending it with the straight run gasoline.

X Q. Yes, that is the first one. Now will you detail that again, please, for me?

A. It merely consisted in sweetening the end point gasoline.

X Q. Straight run?

A. The end point gasoline from the cracking plant; then blending it with the straight run gasoline, mixing it with the straight run gasoline.

X Q. What label could have been put upon that product then, Doctor?

A. 437 end point gasoline.

X Q. Straight run?

A. No.

X Q. Cracked?

A. No.

X Q. What would you have called it?

A. I don't think it would be necessary to call it.

X Q. But, assuming that a company had builded up a policy over a great many years of selling that gasoline under a name and guarantee of straight run gasoline, could they have done that?

A. No, they couldn't have honestly sold it as straight run gasoline.

X Q. That is, it couldn't have been an honest product under that kind of a guise, could it?

A. That is right.

[fol. 489] X Q. What is the color, Doctor, of cracked untreated gasoline that comes from the Cross plant on crude such as you know the Garber and Tonkawa crude to be?

A. It would vary on the standard scale, Saybolt scale, about 16 to 23.

X Q. Assuming now that we have done what you have suggested here could have been done, and that we had mixed from the cracking plant approximately twelve hundred barrels of cracked gasoline, treated as you suggest with the straight run gasoline, in the capacity of approximately six thousand barrels, and that product, dishonest as it might have been, should have been marketed, what would it have done in the pumps?

Mr. Marsh: I object to that "dishonest as it might have been."

Mr. Glasser: Dishonest in label.

The Court: Mr. Glasser asked him whether or not that would be an honest product under those circumstances. He said it would not.

Mr. Marsh: What he said was, would it be honest to call it straight run gasoline.

The Court: That is not exactly what he said. (To Reporter.) Won't you read back there, please?

Mr. Glasser: Rather than argue, I will withdraw the word and let the Doctor answer without that word in the question.

X Q. What would happen to that kind of product so handled and so treated?

A. I don't get your entire question.

X Q. Well, we will assume now that you have mixed it in that manner and we have put it in a tank car and we have sold it to a man, who is operating a filling station in Cheyenne, Wyoming, and he puts it in his pump. What will happen to it?

A. The color would be slightly less, lower than the straight run.

X Q. How much lower?

A. About two or three points lower.

X Q. Will it continue to get a little lower or stay constant?

A. Not if properly sweetened.

X Q. We are assuming now that all of that has been done at the refinery. I am asking you what would happen [fol. 490] to that product after it gets into the pump where it is going to be sold to the consumer?

A. Nothing would happen except to sell it.

X Q. Would it reacidify?

A. No.

X Q. It would not?

A. No.

X Q. Do you think the color would remain constant?

A. The color would drop off about two or three points, as I have already said.

X Q. Would the gum content go up?

A. No, it would not go up.

X Q. Now if this material had been treated with doctor's solution and mixed one part cracked to five parts of thirty color straight run, what would be the color and the odor of the mixed? I assume those factors to be in the proportion that you calculated, five parts to one, and, if I am in error, you correct that, of course, in your answer.

A. The color would drop off about two or three points; assuming the straight run gasoline to have been 30 color, the blended product would have been about 27 or 28. The odor of course would be that of sweetened cracked gasoline.

X Q. What would happen, Doctor, to the value of this product if you should make a mixture of that kind and put it on the market? Would it lower the value of it to the customer?

A. No, it would not.

X Q. You think not?

A. Improve the value of it.

X Q. Upon what theory?

A. On the theory that cracked gasoline is better.

X Q. You think, then, by mixing one part of cracked gasoline that is treated as you have suggested with five parts of straight run gasoline, you would improve your combination?

A. Yes.

X Q. Do you know of that ever having been done anywhere in this country in any refinery?

A. It is a pretty common practice. It has been done for fifteen or twenty years—fifteen years.

X Q. Give me the name of one refiner in the Mid-Continent field that has done that?

A. The Standard of Indiana.

[fol. 491] X Q. I am not familiar with their business. I am talking about some refiner in Oklahoma in the Mid-Continent field.

A. Simms Oil Company.

X Q. That is at Dallas. Can you give me the name of any refinery in Oklahoma that has ever followed that process?

A. Globe Oil & Refining Company.

X Q. Any other?

A. I am speaking of knowledge, what I personally know.

X Q. Yes, sure.

A. There are undoubtedly others. The Sapulpa Refining Company.

X Q. Now, Doctor, in this connection could there be any possibility that you are confusing the liquid phase system with the treatment that you suggested here?

A. No, I am not.

X Q. You are not?

A. Indeed I am not.

X Q. Now you have named two plants where you say this has been done, and they happen to be the two plants that use your liquid phase treatment. Now is there any connection with that suggestion?

A. No. I will explain exactly how I happen to know. I will take one. The Simms Oil Refining Company use our liquid phase treater, and because of the fact that the liquid phase treater slightly reduces the anti-knock value of the gasoline, some of our marketing plants especially requested, at our suggestion, that the gasoline be only sweetened so that they would preserve to a larger extent the anti-knock properties.

X Q. That is sold on particular specification when some customer wants that particular kind of gasoline?

A. No specification at all; merely a marketer who has specialized and pioneered in the production of anti-knock gasoline.

X Q. What label does the Simms Company sell that kind of mixture under? What do you call it?

A. They just sell 437 point gasoline; they don't sell that way; they sell to the market in tank cars, and call it gasoline.

Q. I will ask you this question: do you know of any refinery on the Mid-Continent field that has ever marketed a [fol. 492] barrel of so-called straight run gasoline with any such mixture.

A. The Simms Company itself began the marketing of cracked gasoline mixed with straight run gasoline when they first operated their cracking plants under special brand.

Q. I am asking you if you know of any refinery of the Mid-Continent field that has ever marketed such a product under the name of straight run gasoline?

A. No; I don't think they had any right to do that, of course.

Q. The Sapulpa Refinery that you referred to,—that failed and went into bankruptcy, didn't it?

A. I thought it was operating all the time. That is news to me. I didn't know about it.

Q. How large a plant is the Globe Refinery at Blackwell?

A. I think they run about five thousand barrels a day.

Q. Do you know of any instance of the Globe Refinery at Blackwell ever marketing a mixture such as you propose here under the name of straight run gasoline?

A. I don't know of any refinery who ever marketed a mixture of cracked gasoline and straight run gasoline under the label straight run gasoline. I am not sure that it hasn't been done, however.

Q. What would have been the effect, in your judgment, of the Champlin plant, assuming that it represents fourteen thousand barrels daily capacity straight run gasoline, four thousand barrels charging stock in Cross units for cracked gasoline, with all of the attendant organization, tank cars and all, if it should have violated its policy over a great many years of featuring guaranteeing its product as straight run gasoline, to have thrown into that 14,000 barrels daily production or daily capacity, this cracked gasoline, and then undertake to put that out to the public as straight run gasoline?

Mr. Marsh: I object. The witness has not suggested that. His question is assuming the same problem of arguing his case in his question, based on an improper purpose.

The Court: This is cross examination. I think he can ask that.

[fol. 493] A. The Champlin Refining Company would have done well to mix the cracked gasoline with their straight

run gasoline; but they would have done poorly to mislead the public and tell them that straight run gasoline was better gasoline and then sell it as straight run gasoline.

Q. How could they have marketed the product and under what kind of name?

A. Tell the public the truth, and tell them that it is better gasoline.

Q. And what would have been the result of that upon the name and the standing and the integrity of the company?

A. It might have improved it.

The Court: On account of the situation existing here where they have advanced the time—daylight saving time—I think we will have to meet somewhat earlier in the morning, say half-past eight standard time to correspond with half-past nine the local time. I want to say, while I am addressing you briefly, that of course you see we are nearing the end of the case, and it is getting more and more important that nothing be done to interfere with the propriety of the trial and have no mistrial, and I trust you will bear in mind the importance of not talking about the case with anybody or permitting anybody else to even mention the case to you. An instance like that, even very innocently engaged in, might cause a mistrial of the whole important case.

We will suspend until to-morrow morning at half-past eight standard time.

(Suspended.)

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Tuesday Morning Session (April 20, 1929)

The Court came in at eight-thirty o'clock a. m. standard time, and the taking of testimony proceeded as follows:

Dr. Roy Cross still on stand. Cross-examination by Mr. Glasser continued:

X Q. Doctor, before continuing the matters about which I was questioning you at the hour of adjournment yesterday, [fol. 494] I want to ask you some preliminary general questions. What is your finacial interest in the present license contract that the Champlin Refining Company has on the Cross cracking units?

A. At one time I was a stockholder of the Gasoline Products Company. I was stockholder at the time of the licensing of the Champlin Refining Company.

X Q. I am asking you what your interest is in the license at this time?

A. I don't know that I could explain that, exactly. There is some hangover interest from my former interest in the Gasoline Products Company.

X Q. Well, can't you be more specific than "some hangover interest"?

A. I can't be very specific, because I don't know the exact details, but I have some interest in the outcome of this suit.

X Q. How does your proportion bear to the total?

A. I would guess approximately two per cent.

X Q. Does that include the interest of your brother, Walter Cross, or is that just your interest?

A. No. Just my interest.

X Q. Now, does your brother, Walter Cross, have an identical interest?

A. Yes.

X Q. Does the Kansas City Testing Laboratory have an interest above that?

A. None whatever. No, sir.

X Q. As I understand your interest is two per cent interest in this law suit?

A. No. I don't know that that expresses it exactly.

X Q. Well, your interest would be a two per cent interest in any counter claim that the Champlin Refining Company would assert?

A. No. The royalty obtained as a result of this law suit would mean some income to me.

X Q. You say "royalty"; you mean any judgment or counter claim that the Champlin Company might assert. You would be interested in that, wouldn't you?

A. I would be interested in the net outcome to the Gasoline Products Company.

[fol. 495] X Q. Yes. When did the interest in anti-knock fuel first commence, Doctor?

A. I began to become rather widespread as early as 1924.

X Q. Do you have a machine in your laboratory for measuring the anti-knock value of motor fuels?

—. Yes.

X Q. When did you perfect that device?

A. About 1925.

X Q. It was installed in the laboratory in 1925?

A. It was in operation in 1925.

X Q. What is the standard of the measurement of the anti-knock value of any gasoline?

A. Why, the common way is to express it in terms of benzol equivalent.

X Q. Consistent with economy what average equivalent would you recommend?

A. The standard which everybody tries to reach, who is handling anti-knock gasoline, is a forty per cent equivalent.

X Q. I believe you made the analyses of the fuel oils, or rather the crude oils, that the Champlin Company was using in the month of December, 1925, did you not? For the Gasoline Products Company?

A. Yes. We made some analyses about that time.

X Q. Now, do you have a recollection of those analyses?

A. I don't remember the details, but I do remember that such analyses were made.

("Defendant's Exhibit No. 69" marked.)

X Q. I hand you paper or papers marked Defendant's Exhibit Number 69, and I will ask you to examine it and then state what it is?

A. These sheets represent analyses of gas oil submitted in December, 1925, by the Gasoline Products Company, giving the yields and other information from cracking tests of these samples of gas oil.

X Q. Is that signature on the bottom of each page your signature?

A. That is.

X Q. And the original letter is the original letter which you delivered to the Gasoline Products Company?

[fol. 496] A. I believe that is a copy of the letter or report delivered to the Gasoline Products Company.

X Q. Is that your signature?

A. Yes.

Mr. Glasser: I desire to offer the exhibit in evidence as a part of this witness's cross-examination.

The Court: Admitted.

Mr. Glasser: The exhibit, omitting the caption, reads as follows: (Reading):

"Kansas City, Mo., December 23, 1925. 95273, Champlin heavy gas oil; 95290, Champlin light gas oil.

Gasoline Products Co.,
No. 700 Baltimore Avenue,
Kansas City, Missouri.

GENTLEMEN:

Herewith in quadruplicate are the summarized reports of cracking tests of sample of light gas oil and of heavy gas oil submitted from the Champlin Refining Company.

Please note that the yields suggested cover the manufacture of 437 degrees F. end point gasoline and good merchantable fuel oil. If larger yields are obtained then the fuel oil is not of as good a character, having a higher viscosity.

It is particularly to be noted that both these stocks yield a very light gasoline. We believe that we are perfectly safe in representing yields of sixty-five per cent on the heavy gas oil and seventy per cent on the light gas oil, provided conditions at the refinery are such as to obtain good condensation and to limit refinery losses in treating. Vapor phase treating would be desirable.

Samples of gasoline treated by vapor phase method, as made from these gas oils, are submitted herewith, together with a sample of the fuel oil made from the heavy gas oil.

Very truly yours, Kansas City Testing Laboratory,
by Roy Cross."

[fol. 497] Now, the next page, "Report of Analyses":

"Light Gas Oil. Champlin Refining Company.
Dated December 21, 1925. Laboratory No. 95290.

Summary of Cracking Tests:

Gravity of charging stock, 35.0 degrees Be.
Color of charging stock, Straw.
Gravity of synthetic crude, 39.8 degrees Be.

| Yields | First cycle | Ultimate with recycling |
|---|---|---|
| Gasoline | 31.0% | 82.5% |
| Recharging stock (32.1 degrees Be.) | 63.0% | 0% |
| Fuel Oil | 4.0% | 11.5% |
| Loss (gas and carbon) | 2.0% | 6.0%—" |

The Court: Are there several pages of those?

Mr. Glasser: There are. Four more pages, I think.

The Court: Do you think it would be enlightening to read all those details?

Mr. Glasser: I am only going to read that part that we conceive to be material on laboratory requirements. Not the whole of it. No. (Continues reading):

"Gravity, 62.1 degrees Be. 60 degrees Be.
Recharging stock (—No. That isn't the place.—)
End point, 437 degrees F.

Safe Commercial Yields:

| | |
|---|---|
| Gasoline | 70% |
| Fuel Oil | 20% |
| Loss | 10%" |

Now, omitting the report of the test on kerosene, naphtha, etc., which we are not concerned with, and omitting the fractional gravity distillation analysis of petroleum, and going over to the fifth page, I believe it is with reference to Summary of Cracking Test on heavy gas oils: "Gravity of charging stock, 28.4 degrees Be. Color of charging stock, N.P.A.—E. Gravity of synthetic crude, 34.8 degrees Be. [fol. 498] Gasoline, first cycle, 30.0 per cent, ultimate with recycling, 75%. Recharging stock (30.8 degrees Be.) 60.0%, ultimate with recycling 0%. Fuel oil, 9% (first cycle), ultimate with recycling 21.0%; loss (gas and carbon, first cycle, 1%, ultimate with recycling 4%. Gasoline: Gravity 62.9 degrees, first cycle; 60.0 degrees Be. ultimate with recycling. End point, 437 degrees F. ultimate with recycling, 437 degrees F." Well, we are not concerned with the fuel oil and the loss of gas and carbon. "Gasoline,—well, I have read that." Under the remarks: "This charging stock is well suited to make light gasoline. The initial boiling point of the gasoline obtained is determined by the temperature of condensation. Very respectfully submitted. Kansas City Laboratory. By Roy Cross."

X Q. Those reports as read were all signed by you and made by you or under your personal supervision?

A. Yes.

X Q. Now having in mind the information that has just been read, what benzol equivalent would you assign to the

Champlin cracked gasoline made in 1926, the period immediately following these tests?

A. I don't remember having tested it. The benzol equivalent?

X Q. Yes.

A. I don't believe there is anything here to indicate what the benzol equivalent would be.

X Q. I am asking you what you would assign to it now from your knowledge of the information contained in that report and having in mind the type of oil, what benzol equivalent would you assign to it?

A. This test would give no indication of what the benzol equivalent is. However, I could estimate from my knowledge of the crude oil what it would be.

X Q. That is what I am asking.

A. I would say it would be about 25-20 to 25 benzol equivalent. That is largely a guess on my part.

X Q. It is an accurate estimate on your part, is it not, Doctor?

A. Well, it would be an accurate estimate unless I actually made a test of it.

[fol. 499] X Q. Well, it is as accurate as your opinion could be on a matter that you did not make a laboratory test on, is it not?

A. I can say that cracked gasoline made from that type of crude, in that type of plant and in a normal manner, would have a benzol equivalent of about 20 to 25%. However, that would vary with the conditions of operation as well as the quality of the crude oil used.

X Q. But the purpose of my question now is, for the purpose of advising the jury as to what benzol equivalent you would assign to the oil of the type that is referred to in your report?

A. I believe it would be safe to say that that would have 20% benzol equivalent.

X Q. What is the effect on the anti-knock quality, of anti-knock value of gasoline that has been treated with sulphuric acid?

A. It reduces the anti-knock value.

X Q. To what extent?

A. It depends upon the severity of the treatment. If the normal treatment was used on this particular type of stock, I would say it would reduce it easily one-half.

X Q. Now what would you say with reference to the treatment of the severity that you recommended yesterday?

A. I don't know which treatment you refer to.

X Q. Well, I am asking you the one in which you referred to sulphuric acid treatment.

A. The sulphuric acid treatment would reduce it close to one-half.

X Q. Would that have a corresponding effect upon the value of the product?

A. On its real value, yes, it would.

X Q. What would you say as to the effect upon the anti-knock value of cracked gasoline by the treatment of the Fullers Earth in the vapor phase form?

A. It does not appreciably affect the anti-knock value.

X Q. So that in one instance you have the reduction in actual value of approximately 50% and in the other it isn't interfered with?

A. That is true.

[fol. 500] X Q. That was the reason you recommended the vapor phase treatment for the Gasoline Products Company, was it not?

A. That was one of the reasons, yes.

X. Q. That was the principal reason, was it not?

A. It was not the entire reason. It is one of the reasons.

X Q. Now give the jury any other good reason you have that you had in mind at this time?

A. The simplicity of operation.

X Q. The cost?

A. The cost, yes.

X Q. Did you ever represent to a prospective licensee that a gasoline of high anti-knock value would be made by the Cross cracking process?

A. Yes.

X Q. Did you ever represent also that they should receive a premium for such gasoline, at the period and time in question now?

A. Yes.

X Q. Do you consider that the so-called phase treating system has been a success, commercially?

A. It is.

X Q. Is there any question about the ownership of the liquid phase treating system?

A. Of the patents?

X Q. Yes.

A. I think not.

X Q. Does the Simms Company at Dallas claim to own the system or process?

X Q. Isn't it a fact that the Simms Company claim to own

A. I don't know what they claim, but they don't own it. that process, Doctor?

A. Not that I know of. They had very little to do with the development.

X Q. What is the name of the chief engineer of the Simms Company?

A. I don't know at this time. The man in charge of the treating the last connection I had with them was a Mr. Rumery.

X Q. You know Mr. Gardiner?

A. Yes, I know Mr. Gardiner.

X Q. What connection does Mr. Gardiner have with the company?

A. He is the designing engineer.

[fol. 501] X Q. Who holds the patents, who actually holds the patents on the liquid phase treating system, do you know?

A. Yes.

X Q. Answer, please?

A. The Cross Development Company.

X Q. Now referring to the factors involved in the treatment under the vapor phase, I believe you said that there were a number of factors. Will you for brevity repeat them, please?

A. In favor of it?

X Q. Yes. In favor of the vapor phase treatment.

A. The simplicity of operation, requiring no redistillation. The production of a whiter or less colored product, direct from the cracking plant. A better stability to light. Less expense of operation.

X Q. What was the state of the art in the latter days of 1925 and the early days of 1926 with reference to the vapor phase process?

A. The vapor phase treating process?

X Q. Yes.

A. It was just being commercialized successfully.

X Q. You knew at that time of the Gray process?

A. Yes.

X Q. Were you advised as to what Mr. Gray claimed for his process?

A. Yes.

X Q. Now did you make any investigation of the Gray process?

A. Yes, an investigation was made at that time.

X Q. By whom?

A. I didn't directly make it.

X Q. Do you know by whom it was made?

A. I can't think of the engineer's name now. I think one of the engineers of the M. W. Kellogg Company did make an investigation.

X Q. For what purpose?

A. For estimating the cost of operation primarily. To know whether it was a good commercial process.

X Q. When was the first investigation made as to the validity of the Cross patent?

A. By whom?

X Q. By anyone that you know of?

A. I presume when he made the application in the Patent Office.

X Q. Then when did you first make any investigation as to the validity of Gray's patent?

A. I can't say exactly, but prior to 1925.

[fol. 502] X Q. How did you happen to be interested in the validity of his patent?

A. In a small scale laboratory operations we had used phase treating for a great many years.

X Q. Had you found it to be efficient?

A. Yes.

X Q. Now when did Mr. Schofield become connected with the matter?

A. I don't remember exactly.

X Q. Did he become connected at your direction or some one else's direction? If you know?

A. Why, I think he investigated at the suggestion of the Cross Development Company.

X Q. First?

A. As far as I know.

X Q. Who sent Mr. Schofield to Enid, do you know?

A. I don't know.

X Q. Did you have anything to do with that?

A. I knew that he went to Enid but I did not send him.

X Q. Under whose immediate direction was Schofield acting at the time he came to Enid in connection with the Champlin matter?

A. I don't know.

X Q. Do you know when Schofield first went there?

A. Only approximately the time.

X Q. Do you know what he went for?

A. Yes.

Q. What?

A. He had what may or may not have been considered prior art on the vapor phase treating, and my understanding he was merely going to show the Champlin Refining Company's attorneys or Mr. Champlin such data as he had.

X Q. He was armed wi-h drawings, specifications and—strike the word "and," concerning a patent that had been granted by the German government many years ago, was he not, Doctor?

A. I know that he had a copy of the German patent and an English patent.

X Q. Now you were of the opinion at that time that the Gray patent was invalid, were you not?

A. No.

X Q. Did you have any opinion about the matter?

A. Yes.

X Q. Well, how did you reflect that opinion?

[fol. 503] Mr. Hale: What do you mean by "how do you reflect the opinion?"

Mr. Glasser: I want to know what he did about it.

A. I had an opinion about the Gray patent, but I didn't have any opinion that it was invalid. I had an opinion as to its scope.

X Q. What opinion did you have as to its scope?

A. Based on the claims I had the opinion that it did not cover all the phase treatment.

X Q. Now just what did your Cross Development Company or yourself or your brother Walter propose to do when you talked about a Cross vapor phase treating system tower?

The Court: Proposed to do in what connection?

Mr. Glasser: In the use of the tower. What process did they propose into effect?

Mr. Marsh: When?

Mr. Glasser: At the time in question, of course. All of these questions are——

Mr. Marsh: He has covered a range of several years here.

Mr. Glasser: Oh, no. I am not seeking to do anything of the kind.

Mr. Marsh: I don't object to the examination. If he will give the dates so the witness will know what we are talking about.

X Q. I will refer particularly to the last ninety days in 1925 and the first ninety days in 1926. That six months period.

A. I was aware of the fact that I had been some time—the vapor phase treatment with clay or Fuller's Earth make a practically colorless product, a more merchantable product, but this treatment did not remove the odor, the objectionable odor from the gasoline, nor would it remove the sulphur.

X Q. Now will you explain to the jury just what the Gray process claimed to do in the patent that Mr. Gray was granted—what his claims were?

A. I can't repeat claims.

The Court: The patent will show that.

Mr. Glasser: I thought perhaps this witness might be familiar with the claims.

[fol. 504] The Court: These claims are usually technical and very comprehensive.

Mr. Glasser: This witness is entirely familiar with the technicality of the claims.

The Court: Of that particular claim?

Mr. Glasser: Yes.

X Q. You fully understood Mr. Gray's claims, did you not, Doctor?

A. I did at that time, and I could if I read them again, but I haven't seen them for two years, and I am not exactly sure now as to what they covered.

X Q. Just what did you propose to do with your Cross vapor phase treating system?

A. We proposed to add copper.

X Q. To what?

A. To the clay, or use copper in conjunction with the clay.

By the Court:

Q. Was that the only practical difference between your system and that of Mr. Gray?

A. No; there were certain limitations, as I felt, to the Gray patent, which comprised temperatures, temperatures of the clay when the vapors were passed through the clay. There were certain limitations in the Gray patent I do not have clearly in mind at this time, just what those limitations are.

By Mr. Glasser:

X Q. Did you direct Mr. Keith or Mr. Schofield to make plain to Mr. Champlin that there were any limitations upon that end of the process?

A. No.

X Q. Now, Doctor, isn't it a fact that the Cross Development Company, as well as yourself and your brother Walter and Mr. Keith and Mr. Schofield, were all of the opinion that by adding copper to the process set forth in Mr. Gray's claims that you would get a better process and that that was all there was to your so-called Cross vapor phase treating system tower?

A. The patent which we had at that time was not a process patent, as I remember it. It was a product patent, that is, it was a patent for a material and that material consisted in a copper treated clay.

X Q. Without regard to the device in which the copper clay would be used?

A. Yes. Of course I wish to correct that to this extent, [fol. 505] that we had applications for devices for using this material which were in the patent office at that time, but had not been allowed.

X Q. Did you have any application pending for any device that was materially different from the Gray device?

A. Yes.

X Q. In what respect—with the further modification, for the use of the copperized clay treatment?

A. I can't tell you. I don't remember the exact details. But some of them included an upward flow of vapor—special means so that the vapor could flow upward instead of downward.

X Q. Why was that application pending? What was your purpose in seeking a patent upon that?

A. In the normal upflow of vapor, which is generally conceded to be old practice, not patented, the liquid condensing or the pulmer condensing in the clay obstructs the passage of the vapor, and one of the applications that I happen to remember now was designed to provide the drainage of this pulmer or liquid.

X Q. Were those applications after- pursued?

A. I think they are still in the patent office. Possibly some of them have been allowed.

X Q. I ask you if they were pursued?

A. Yes.

X Q. Was that particular application ever allowed?

A. I can't say as to that.

X Q. Were you advised as to what representations were being made to Mr. Champlin by Mr. Schofield and Mr. Keith as to that vapor phase treating system tower?

A. No, I don't know what representations they made.

X Q. Having in mind the device that you have been testifying about with reference to your applications for patents and the Fuller's Earth treatment, whether or not you think that that device was an infringement of the Gray patent?

A. No, I do not.

X Q. To what extent had your laboratory experiments been conducted prior to January 1, 1927, with reference to the impregnation of the Fullers Earth or the clay with copper?

[fol. 506] A. We had used this material in preparing samples in small scale operations for several years.

X Q. Did you believe that that time, on that date, that the process was sound?

A. Yes.

X Q. And did you believe that it would function economically and satisfactorily?

A. Under some conditions I thought it would.

X Q. Now will you explain to the jury the difference between the functioning of the Gray process, in its results, as compared with the process that you knew as the Cross vapor phase treating system tower, having in mind Champlin oil, as disclosed by your examination, and the time as of the month of January, 1926?

A. I am not familiar with all phases of the Gray process. I was familiar with and remember in a broad way the specifications and claims of one patent. If there are other patents which would be a part of the process, I don't know about them. But that particular patent is the Gray process to me as I knew it at that time.

X Q. That is what I am asking you about, the Gray process as you knew it at that time, not as you know it now, but as you knew it at that time.

A. The outstanding features, as I remember it, were the superheating of the clay and the downward passage of the vapors through the clay.

X Q. Either I am not making my question clear or you are not answering it. I will again try to repeat it. I am asking you now for the difference in the functioning of the Gray process as you then knew it, as compared with the process which you knew as the Cross vapor phase treating system.

A. You mean by that the ultimate result?

X Q. Ultimate result, yes.

A. The Gray process, as I knew it, produced a water-white gasoline which did not pass the doctor test, the copper corrosion test, and did not give a sweet odor. The process which we proposed did these things and in addition sweetened the gasoline and made it pass the doctor and copper corrosion tests.

[fol. 507] X Q. In other words, a finished gasoline of the highest commercial value?

A. Yes.

X Q. And that was the difference between the Gray and the Cross vapor phase treating system process?

A. That would be the difference in the result as between them at that time.

X Q. Now, if the Cross vapor phase treating system tower functioned as you believed at the time that it would function, it would have been an improvement over the then state of the art, would it not?

A. It would have made a better gasoline.

X Q. It would have been an improvement in process, would it not?

A. Yes, it would have been an improvement.

X Q. That is what you were striving to bring about?

A. Yes.

X Q. And you believed at the time that you had brought it about, did you not?

A. The fact that a patent was granted means it was an improvement on the art.

X Q. Now, assuming that the device which you have in mind as the Cross vapor phase treating system tower, had been installed and there had been no copper in the clay, no impregnation of copper in the clay, what would have been the result of that process?

A. Been essentially the same as the Gray so far as result is concerned.

X Q. What would have been the commercial difference in the ultimate result of the product, as to what kind of product that it was?

A. Difference from the copper tower?

X Q. Yes.

A. As I have just stated.

X Q. Perhaps that is not clear to the jury. Will you restate now the reverse of the proposition for me?

A. The gasoline would have been water-white and it would not have, however, passed the copper corrosion or the doctor test.

X Q. What further process would have been necessary then under the conventional state of the art at that time to have made it the same kind of product that would have been obtained from the Cross with the copper in the clay? [fol. 508] A. There is no method that would have gotten the same result in so far as sweetness and copper corrosion and sulphur are concerned, except the acid treatment.

X Q. Acid treatment. Was there anything else that was needed?

A. I think that was all.

X Q. Wouldn't it have been necessary to have sweetened that after the acid treatment with the chlorine treatment?

A. Acid treatment, as I understand, includes the sweetening.

X Q. You mean by that then to sweeten the process with chlorine treatment?

A. Not necessarily chlorine treatment; it might have been litharge treatment.

X Q. Under whose direction was the Cross vapor phase treating tower designed?

A. I don't know that one was designed at all commercially.

X Q. Well, do you have any knowledge of an effort being made to design one for the Champlin Refining Company?

A. No.

X Q. Did you know Rudolph Mitchell?

A. Yes.

X Q. Did you know Mr. Mitchell at the time in question during the early months of 1926?

A. Yes.

X Q. By whom was he employed at that time?

A. In the early part of the year by the Cross Engineering Company.

X Q. That was one of your companies, was it not?

A. Yes.

X Q. Do you know of Mr. Mitchell being engaged in that period of time in the effort to design a tower for the Champlin Company?

A. I know he was working with the Champlin Company on compounding plant and some other things, but I don't know exactly the relations with the Cross Development Company or the towers. I think, however, that he was doing something about towers. I personally had nothing to do with that department at that time.

X Q. What in your opinion would have been the proper size tower to have properly functioned in connection with the product that would have been received from the Cross [fol. 509] cracking units that were actually installed at the Champlin plant as to diameter and size?

A. That of course would be subject to variations depending upon the length of the run; but I would say a tower eight feet by twelve feet would have been a satisfactory design.

X Q. Did you ever personally supervise the design of any refinery equipment?

A. I have worked in connection with designs on a number of refineries, but never completely supervised the design of any plant.

X Q. Did you ever personally supervise the construction of any refinery equipment?

A. No; not to any extent.

X Q. Did you ever supervise the operation of any refinery personally?

A. Yes.

X Q. Where?

A. I supervised the operation of the first bubble cap tower.

X Q. I do not use the word "refinery" in a restricted sense. I am using it now in the sense of a completed plant.

A. I was never superintendent of any refinery.

X Q. Did you ever engage personally in the actual marketing of any product from any refinery?

A. Never was in the oil business in that sense.

X Q. Now, Doctor, when did it first become known in your laboratories that the so-called copperized clay method of treatment would not be practicable, if that ever did become known there?

A. I never said that it was not practicable.

X Q. You are not convinced of that fact as yet, are you?

A. It never has been thoroughly tested out.

X Q. Answer my question: I say you are not convinced of that fact as yet, are you?

A. I am not.

X Q. And so far as you now know it would do the work just as you claimed it would at that time?

A. It would do the work. There is no question about that. The only problem to be worked out is whether it would be economical or not.

By the Court:

Q. There has never been any commercial construction of any one of these plants?

A. There never has been so far as I know.

[fol. 510] By Mr. Glasser:

X Q. If there had been you would know of it, would you not?

A. Not necessarily.

X Q. You and your associates controlled the patents applied for and you controlled the Cross vapor phase treating system tower did you not; whatever it might have been?

A. We don't control the freewill operations of people who care to violate patents.

X Q. If there is any violation without your knowledge that is another matter; but I am assuming now that our

question is predicated upon plants that are not violating patents.

A. So far as I know no copper clay vapor phase treating tower has been erected in accordance with our patent.

By the Court:

Q. I understood you to say yesterday that you thought this copper feature was impracticable. Didn't you say that?

A. It is expensive.

Q. Didn't you say that it was commercially impracticable?

A. Probably is. I concede that it probably is; but still it is in the same state that it was two years ago in my mind.

Q. Meaning by that what?

A. It must be given a fair commercial trial before any ultimate decision can be reached.

Q. You think there is still a possibility that it may be commercially practicable?

A. Yes.

Q. Has there been any litigation between the two patents, one involving the copperized treatment and the Gray process?

A. There has not.

By Mr. Glasser:

X Q. I understood you to say yesterday, as the Court has suggested, that the process was impracticable,—that is, the copper method. I will now ask you what test you made or what test was made under your supervision or in laboratories that indicated that it was impracticable in any sense for use?

A. The question of practicability lies in the amount of clay and the amount of copper to treat a given amount of oil, and on the basis of an oil seventeen-one-hundredths per cent of sulphur and based on our laboratory experience, it would require six pounds of clay per barrel of gasoline to properly reduce the sulphur. The reason for the large [fol. 511] amount of clay is due to the fact that an excessive amount of copper mixed with the clay cannot be used. If the amount of copper exceeds five or ten per cent mixed

with the clay, then instead of decolorizing it will produce even higher color in the gasoline, although it completely removes the sulphur; for that reason that complication is possibly a serious drawback to the process.

X Q. Was that complication understood by you in the month of January, 1926?

A. Yes.

X Q. What would have been the result if the vapors had been passed through your copperized clay as you have just outlined to the jury and then a second operation of passing it through clean Fuller's Earth, in your opinion?

A. That was one method proposed.

X Q. That would have solved the question, would it not?

A. We hoped so.

X Q. You are of the opinion that it would have?

A. No; I haven't any definite opinion.

X Q. Have you made any laboratory tests?

A. Yes; we made laboratory tests.

X Q. What did the test disclose?

A. If pure copper is used we haven't got so strong a color in the vapor gasoline that subsequent treatment by the Fuller's Earth would not remove it.

X Q. What type of copper did you propose to use in this process according to your literature?

A. We were using copper oxide.

X Q. Where is that obtained and from what source?

A. We use a copper oxide which is obtained from copper wire rolling mills.

X Q. Discarded copper?

A. Oxidized copper.

X Q. And why did you recommend the use of that particular copper?

A. Because it was cheaper than any other.

X Q. Is that the type of copper that you just had in mind in your statement to the jury of pure copper?

A. Yes.

[fol. 512] X Q. What proportion of copper did you intend to put into the clay to get the result that you hoped for?

A. In our labortory work we used five per cent in the clay.

X Q. Did the first intimation that the so-called copperized clay or Cross vapor treating system tower was impracti-

cable come from your laboratory or come from the office of M. W. Kellogg & Company?

A. I always felt that it might be impracticable, but desired a commercial installation. Frequently commercial installations can be operated more economically than the theoretical results would indicate.

X Q. The question again in different form: From what source did the first definite statement come that the process was not practicable,—your literature or the office of M. W. Kellogg & Company?

A. I don't know as to that.

X Q. What is your best recollection about it?

A. I felt myself, always did, that it would be impracticable under certain conditions.

X Q. Without regard to what you felt about the matter, I am asking you about specific direction to Mr. Keith or to any of the employed. From what source did the first direction come in 1926 that gave out the information that the process was impracticable and that the copper would probably be lost in the process? Where did that information first come from?

A. That was general knowledge at that time among all of us.

X Q. Who found out that it was general knowledge? How did that arise?

A. I couldn't say.

X Q. Did Mr. Keith have general knowledge of that fact in January, 1926?

A. I am quite sure that he knew the facts at that time.

X Q. Is it your understanding now that when Keith came to Enid with Mr. Welling about the 27th day of January, 1926, that he, Keith, understood and had general knowledge that that was true?

A. I can't say as to what ideas he had about it. I thought that I had explained my views to him.

[fol. 513] X Q. You thought you had made that plain to him at that time? Is that your recollection of it?

A. Yes; but I thought even in view of those facts it was worth an experimental trial.

X Q. You had made plain to Keith the facts about the matter prior to his visit to Enid in January, 1926?

A. I don't remember any particular occasion I did; but I presume that I did.

XQ. Did you know that Keith and Welling were going to Enid?

A. I haven't any distinct recollection of it.

XQ. You knew that Keith and Welling were trying to sell Champlin a Cross cracking plant?

A. I knew that Keith was.

XQ. You knew that prior to the first day of January, 1926, did you not?

A. Keith became associated with the Cross Engineering Company December 11, 1925, and subsequent to that time he had charge of any sales efforts directed against Mr. Champlin.

XQ. You knew that Keith was trying to sell Champlin during the period of time immediately following his employment a Cross cracking unit?

A. Yes; that is true.

XQ. You knew that the matter of vapor phase treating was a serious question in that proposed sale, didn't you?

A. No.

XQ. Why did you, in your letter of December 23, 1925, make mention to the Gasoline Products of the vapor phase treatment?

A. That appeared to be very desirable with the particularly good type of charging stock that the Champlin Refining Company had available.

XQ. Keith reported back to you from time to time his various conversations with Mr. Champlin, did he not?

A. No; I saw very little of Keith at that time.

XQ. Prior to Keith's visit of January 27, 1926, it is your opinion now that you made very plain to him the impracticability of the Cross vapor phase treating system tower? Is that true?

A. I wouldn't put it exactly that way.

XQ. Put it your own way.

A. I tried to set out to him the scope and the possibilities and the dangers connected with the process.

[fol. 514] XQ. It is suggested by Mr. McKeever, you knew that Mr. Keith was at that time making the effort to sell Mr. Champlin a Cross cracking unit, or two units of 2000 barrels each I expect I should say, and that the effort was being made upon Keith's part to include within that sale a so-called Cross vapor phase treating system tower to be used in connection therewith, that would give Mr. Champlin a completed product in one process?

A. I didn't know that.

XQ. Having in mind the directions that you gave Mr. Keith prior to January 27, 1926, which you have just testified to, I will ask you to state if he was within the information which you had given him when he handed Mr. Champlin a letter with this language contained therein: "The installation is to be made solely at the expense of the Gasoline Products Company and no monies are to be paid by the Champlin Refining Company to the Gasoline Products Company until the installation is operating in a satisfactory and feasible manner. The unit shall be said to be satisfactory when the gasoline produced from it has a color when measured by a standard Saybolt color machine as ordinarily used in the refining industry of 25 or better, is sweet to the doctor test as ordinarily understood, passes the copper strip corrosion test, and after eight hours' continuous exposure to the sun still has a color of 21 or better."

A. I gave him no such directions or any directions.

XQ. Answer the question?

The Court: You asked him if he was within his information when he made that statement.

Mr. Glasser: The information which Dr. Cross now states that he gave to Mr. Keith prior to this time with reference to the impracticability of that process.

The Court: I want to know—You want to know whether Keith was within the information which he had received from Dr. Cross?

The Witness: I understand the question he asked me, whether——

[fol. 515] The Court (to the witness): Do you understand the question?

A. Yes. I didn't give Mr. Keith such directions.

The Court: No. He said information.

The Witness (to Reporter): Read the first part of that question. I think that will clear it up.

The Court: It begins with, "Having in mind the directions you gave——"

A. (Interrupting): I gave Mr. Keith no directions.

Mr. Glasser: Will the reporter please read the question?

Reporter (reading): "Having in mind the directions that you gave Mr. Keith, prior to June 27, 1926, which you have testified to, I will ask you to state if that was within the in-

formation which you have given him when he handed Mr. Champlin——"

A. (Interrupting): The whole question is predicated upon my having given directions, and I didn't give directions.

The Court: There isn't——

Mr. Glasser: I will put the question this way, and perhaps clear this up.

X Q. Did you give Mr. Keith any information concerning the matters referred to in that paragraph?

A. I think probably I did.

X Q. Just what information did you give him?

A. I gave him the information as to what this copper clay would do.

X Q. Did you tell him it would do what that paragraph says it would do?

A. In some respects I did.

X Q. Well, in what respects not?

A. I told him it would make gasoline which would pass the copper strip corrosion test.

X Q. I will ask you this question, Dr. Cross: Having in mind the paragraph just read, I will ask you to state whether or not Keith, in making those representations, followed the information which you had given him, or did he deviate therefrom; and, if so, in what respect?

A. I don't know.

[fol. 516] X Q. Well, you know what information you gave him, do you not?

A. I know I gave him——

X Q. Just answer that by yes or no?

A. I gave him information. Yes.

X Q. Well, my question was, Doctor, do you remember what information you gave him?

A. No. Except from the general facts that existed at that time.

X Q. Where was the information, as you now remember it, which you did give Mr. Keith—where was that information which you now remember of having given Keith, not in conformity with the paragraph which you incorporate into this letter?

A. As to the quality of the gasoline, it is.

X Q. Am I to assume, then, that it is not in all other respects?

A. Insofar as the rest of the letter not involving the character of the product, I had nothing to do.

X Q. Now, referring back to the first definite information as to Mr. Keith breaking the news to Mr. Champlin, do you know anything about that?

A. No.

X Q. Do you remember a conference with your brother Walter, between Mr. Mitchell and Mr. Keith and Walter, in which the matter was discussed, as to how this should be gotten over to Champlin?

A. No.

X Q. You were not present?

A. I don't remember it.

X Q. You have no personal knowledge of that?

A. No.

X Q. Did your company ever receive any part of the twenty-five thousand dollars that was advanced by the Gasoline Products Company for the installation of the commercial installation of the Cross vapor phase treating tower?

A. No.

X Q. Doctor Cross, I will ask you if you, at the time in controversy, were you acquainted with the reputation of the Champlin products in the trade territory in the Mississippi valley in which it sells those products?

A. Oh, in a general way only. I can't give any specific instance.

[fol. 517] X Q. I am just asking the general reputation of the products?

A. The general reputation was good.

X Q. Does the U. S. Motor gasoline pass the corrosion test?

A. Yes. It should pass the corrosion test. That is one of the specifications.

X Q. Has your laboratory issued a Bulletin No. 25—(indicating). Hand-book of Petroleum, Asphalt & Natural Gas.

A. Not on petroleum. No.

X Q. That is the latest authority that is used by your laboratory on the petroleum industry?

A. That is the latest publication, on petroleum.

X Q. I hand you the book and asking you to refer to

page 386 thereof, which I will have the reporter mark by his initials.

The Court: Instead of using it as an exhibit, why don't you read what you want to from that?

Mr. Glasser: That was what I was proposing to do, if Your Honor please.

X Q. Referring to the preface of the book in question, it appears that the name Roy Cross is signed to the preface. Is that your name?

A. Yes. I wrote the book.

X Q. Handing you the book at page 386, I will ask you to state what the data is that is there set forth? Hand-book of Petroleum, Asphalt & Natural Gas.

A. It is the U. S. motor specification.

X Q. Referring particularly to the corrosion, what do you say there in your test book about it?

A. You can get qualities——

The Court: Are you reading or quoting?

Mr. Glasser: I asked him to quote and he isn't quoting.

The Court: Do you want to read it?

Mr. McKeever: Yes. Why not read it.

The Court: If you want to read the book, read it to him. Otherwise we won't know what it is.

A. I want to refer to the compiled specifications.

[fol. 518] X Q. All right.

A. The copper corrosion test is negative there.

X Q. Then the copper corrosion test isn't a specification?

A. I will correct that. It is not a test.

X Q. All right. Now, on yesterday, Mr. Marsh asked you a hypothetical question predicated upon the evidence that you had heard here in the courtroom as to certain—and then asking with reference to certain methods of procedure that might have been adopted in your judgment as being sound, predicated upon that evidence. Now, I wish to ask you what factors you had in mind in your answer to Mr. Marsh with reference to the five methods of procedure that you later outlined in your testimony on direct examination, as confronting Mr. Champlin on the 16th day of September, 1926?

A. Do you want me to outline these different methods again?

X Q. No. What factors did you have in mind upon which you suggested the five methods?

A. The question of selling the product. That was the only factor.

X Q. Expediency?

A. Well, I had in mind doing various things for the purpose of selling the gasoline.

X Q. Well, Doctor, in framing those answers, or, rather, in defining those methods, did you have in mind the factors that confronted Mr. Champlin upon that occasion?

A. I don't know all of the circumstances surrounding his refinery, of course.

X Q. Well, that's what I am getting at. Now, putting yourself in Mr. Champlin's place on the sixteenth day of September, 1926, with something between six and seven million gallons of charging stock on hand, and two 2,000 barrel Cross cracking units completed, and no treating process available, with the other factor of the refinery in operation and all of these matters of overhead, and pipe lines and tank cars, and so forth; I will ask you now if you predicated your methods on that picture or from now looking back on the picture?

A. No. As I understand it existed then.

[fol. 519] X Q. Well, you weren't familiar with the Champlin Refinery at that time?

A. No, I am not familiar with it now.

X Q. And you were not familiar with it at that time? That was my question, Doctor.

A. No.

X Q. You don't know just how it was situated, and you are not acquainted with the problems that confronted it, either from the marketing standpoint or the gathering of the crude oils, the contracts that were involved in those crude oil purchases, the refining processes, the manufacture, or the distribution, were you?

A. I was not familiar with any of the particular internal conditions of the refinery.

X Q. No. Would the factor of the Champlin Company's purchase of crude oils—assuming now that it was a purchasing company in its stores of crude oil supply—rather than a producing company—change your views in any respect to that matter?

A. No. I think not.

X Q. If the company was confronted with the purchase of crude oils that were coming into the refinery that had to be taken care of, would that change the picture?

A. I mentioned in my testimony yesterday that I didn't know as to the ability to restrict that crude oil.

X Q. Now if you were not advised of all the factors that actually enter into that picture of a refinery of large capacity with considerable investment, how can you then undertake to say that any particular method would be the right one, other than the method that was employed by him at that time that he was most interested in the controversy?

A. I couldn't say as to which particular method, but there were several alternative methods, some of which certainly would fit into a large refinery.

X Q. What was the purpose, what was the aim on your part, in those methods, as you defined them, as to what you were trying to do by the suggestion of those methods?

A. What was that question?

(Question read by reporter.)

A. To make a marketable gasoline.

[fol. 520] X Q. You were seeking to present a method by which the responsibility for the situation that had arisen could be taken from the Gasoline Products Company and put upon Mr. Champlin, were you?

A. I don't understand the question.

X Q. Well, you were not seeking in your answers yesterday in these methods that you said might have been employed, you were not endeavoring to fix responsibility for what subsequently happened, were you?

A. Not at all. I answered in a way that I would answer to Mr. Champlin if he had asked me at that time.

X Q. Now assuming that Mr. Champlin was going on the train that night of the 16th of September, and arrived in Kansas City the next morning and submitted his problem to you, would you have undertaken to advise him without inquiring into the factors that I am now talking about?

A. I would have found out everything I could about the operation of the refinery.

Q. Would you have made inquiry now about these factors that I am now questioning you about, source of supply of crude oil, marketing conditions in his particular prob-

lem, his territory, the kind of customers that he had, and the kind of product that he sold, all of those factors would have entered into it, wouldn't they?

A. They would.

Q. Assuming that Mr. Champlin had told you on the morning of the 17th of September that it was utterly impossible for him to market the kind of a product that you proposed in your first method, what would you then have said?

A. I would have given him instances where other people had said the same thing and made the market.

Q. Dr. Cross, I hand you the oil price hand-book for 1927, and ask the reporter to mark Refinery markets gasoline, Oklahoma, 1927, the page. Page 8, mark it Exhibit M.

The Court: Are you going to use up an exhibit number on that?

Mr. Glasser: I can't see how we can do very well otherwise.

The Court: Are you going to put the book in?

[fol. 521] Mr. Glasser: The particular page. That part that is material.

Mr. Hale: My understanding was the book was available for reference.

Mr. Glasser: If counsel will agree that we may read from it then we won't need to use the number.

(Exhibit not marked with an exhibit number.)

Q. Handing the oil price hand-book for 1927, the Refinery markets for 1927, Oklahoma——

The Court: That is the book which Mr. Leverton introduced?

Mr. Marsh: Yes, and about which the Doctor testified yesterday.

X Q. Will you compare for the jury the price on the 58-60 U. S. motor- with 60-62 437 end point gasoline for the period of time in question?

A. The price of 437 end point 60-62 isn't given for the January average, but for the February average the 60-62 is about a quarter of a cent higher.

X Q. Than the 58-60 U. S. motors?

A. Than 58-60 U. S. motors.

X Q. Will you carry that comparison further down say until the month of September?

A. It is approximately fourteen hundredths of a cent higher in March, and about eleven hundredths of a cent higher in April.

X Q. That seems to be far enough. Do you have the average by weeks there in January?

A. Yes. The weeks.

X Q. Will you give the jury the average by weeks in the month of January?

A. January 31st there is a wide range given for the full 437 60-62, ranged from nine cents to nine and a half cents, so it is difficult to draw a comparison on that, but in fact that exists in all instances. There is a quarter of a cent range given during January, but the average range is about a quarter of a cent higher than it was. 60-62, 437 end point—that is for the 58-60, 437 end point U. S. motors.

X Q. Having those prices before you, I will ask you to state whether cracked gasoline or rather gasoline made [fol. 522] by mixing 20% cracked gasoline and 80% straight run of gasoline as outlined in your testimony yesterday would have commanded the same or better prices?

A. If the distillation range were satisfactory for U. S. motor gasoline that would not affect its price.

X Q. I will ask you if there are any intermediate specifications on that 60-62?

A. No.

X Q. Then the matter of intermediate ranges would not be involved in that price, would it?

A. In the 60—in this particular grade it would not.

X Q. That is what I am asking about. If the Champlin Company made gasoline of that grade, 60-62, and marketed it, the intermediate volume point would not be involved in that?

A. That is true, but in blending of course the specific gravity is specified. Care has to be used to see that the gravity range is not overstepped.

X Q. Now, Dr. Cross, referring to the Exhibit 69 and the summary of your analyses on the light gas oil, I will ask you if it isn't a fact that you there certified that there

could be obtained on a 70% recovery gasoline of a gravity of 62.1 for a commercial yield?

A. No, you are interpreting that incorrectly.

X Q. What is the proper——

A. 62.1 gasoline was actually made in the laboratory with very low temperature condensation.

X Q. Do you mean by that that the statement contained in your report could not be relied upon?

A. The analysis never represents that 62 as far as I know gravity would necessarily be made. If you refer to the letter I am inclined to think it is covered there.

X Q. Go ahead.

A. You read the first paragraph.

X Q. You read the clause and then make any explanation you wish.

A. We believe that we are perfectly safe in representing yields of sixty-five per cent on the heavy gas oil and seventy per cent on the light gas oil, provided conditions at the refinery are such as to obtain good condensation.

[fol. 523] X Q. Now assuming that conditions were such at the refinery that you could obtain good condensation, then the representation of the safe commercial yield here could be relied upon?

A. Yes, but not the gravity.

X Q. I will get to that. If the proper condensation conditions obtained, the safe commercial yield on the light gas oil would be 70% and on the heavy gas oil 65%, and that could be relied upon?

A. Yes.

X Q. Now just what did you mean by saying that gasoline of a gravity of 62.1 could be obtained, and if you had any qualification of that, what is there there to indicate such a qualification?

A. This is the gasoline actually made in the laboratory, and in the laboratory low temperature condensation is practiced, actually—possibly zero or even 20 degrees below zero condensers are used.

X Q. You also set forth here that there is an ultimately recycling. What do you mean by that?

A. That means recycling all of what was termed recharging stock until no recharging stock is left.

X Q. You estimated or thought that 82.5%——

A. No, that was the actual recovery in the laboratory tests. I didn't mean to give the impression and I don't think the report gives the impression that that would be obtained in commercial practice.

X Q. What do these figures 60, what do you call that (showing to witness)?

A. 60 degrees.

X Q. 60 degrees marked Be. What does that mean?

A. That refers to the 60 degrees Beaume. That is the gravity.

X Q. That is the gravity?

A. Yes.

X Q. So that so far as this report shows on its face, on your summary, you did say on the first item the gravity would be sixty-two and one-hundredths degrees Beaume, and on the other recovery it would be sixty degrees Beaume, did you not?

A. I don't know whether I wrote that in or not.

X Q. Whose handwriting is that?

A. I couldn't say.

X Q. Look at it closely.

A. (Examining) I can't tell.

[fol. 524] X Q. Is it yours?

A. I don't know.

X Q. Let's look at the other. The other seems to be on the typewriter?

A. Yes.

X Q. That was on it when you signed it?

A. Yes, sir.

X Q. Will you explain to me just what qualification now you wish to put upon those figures with reference to the gravity of this gasoline on the report that covers the light gas oil, the summary rather that covers the report of the light gas oil, and with the same explanation and modification on the report that covers the heavy gas oil?

A. There are no qualifications except those that I have given, that is, that these were laboratory samples made by condensing at very low temperatures, getting a large amount of material that ordinarily in commercial operations would go off as gas.

X Q. I am asking you if it is not a fact that the samples of the oil which the Champlin Refinery submitted to you and upon which this report is made, assuming now that that kind of crude oil was being used—I will ask you if it is not a fact that this report shows that we could make, and be on the safe commercial yield percentage as set forth in your report, a gasoline equal to the gasoline marked 60-62 437 end-point there on which you just quoted the price?

A. No, that doesn't mean that.

X Q. Couldn't be done?

A. I wouldn't want to guarantee it.

X Q. What is your best opinion about it?

A. That refers to the end point. It means for 437 end point. All of our representations were based on 437 end point gasoline.

X Q. You used this language in the third paragraph of your letter: "Yield a very light gasoline"?

A. Yes.

X Q. What does that mean, "very light gasoline"?

A. That means high Beaume gravity.

X Q. High gravity?

A. Yes, sir.

X Q. It means an extraordinarily good product, does it not, Doctor?

A. Not necessarily an extraordinarily good product.

X Q. Isn't it so considered in the trade?

A. The high gravity commanded a better price at that time; that is true.

[fol. 525] X Q. Isn't it so considered in the trade, to be the best product when it has high gravity?

A. Not necessarily.

X Q. You did think it important to call attention to the fact that it would yield a very light gasoline?

A. Yes. It did. I may explain that further by the fact that ordinarily in the average cracking plant the cracked gasoline will not be above 56-58 gravity, whereas this would be much lighter than that.

X Q. The samples that you examined from the Champlin stocks yielded a much better gasoline than what you were accustomed to examining, did they not?

A. A lighter gasoline would be produced from those stocks normally.

X Q. So much so that you found occasion to mention the fact in the letter to the Gasoline Products Company?

A. That is true.

X Q. Now I want to know so that we can talk definitely to this jury just how much qualification and how much modification you want to now put upon that gravity of the gasoline as set forth in this report, and as now being your opinion of what we could have done? Do you want to change this in any way?

A. No; that is a test.

X Q. All right.

A. Based upon that test at the bottom of the report, certain commercial runs have been suggested as probable.

X Q. Well, this test was made for someone to rely upon, wasn't it?

A. Yes.

X Q. Made for the Gasoline Products Company so that they could in turn tell us about it?

A. Yes, sir.

X Q. And when you made this test for them, you made it with that thought in mind, that it was going to be relied upon?

A. Yes.

X Q. Now do you mean to say that we now do not have the right to rely upon the representation therein made?

A. I think you can rely upon the representations. That is 437 end point gasoline, however, in the commercial yields.

[fol. 526] X Q. That is all right, but it would be of a gravity between the 60-62 gravity price you are talking about?

A. Not necessarily. It doesn't show that.

X Q. Take that and show the jury wherein it would not be?

A. It doesn't say anything about that in commercial yields.

X Q. I am not asking you about that with reference to the report. I am merely asking wherein the report would qualify in any sense the commercial gravity?

A. There is no qualification there as to commercial yields.

X Q. You do say there should be a commercial qualification placed upon them now in actual practice as distinguished from a laboratory test?

A. In actual practice in making reports to the Gasoline Products Company, commercial yields always referred to

437 end point gasoline, to correspond in a general way with the guarantee we understood they were making as to the output of the plants to be built.

X Q. Isn't it a fact, Doctor, that this report discloses a gravity on these tests upon this crude oil that indicates a gravity within the second column there, which is the gravity 60-62, and the price corresponding?

A. No, it does not.

X Q. Wherein does it not?

A. I have explained that two or three times, Mr. Glasser.

X Q. I may be thick in the head, but I don't get your explanation.

A. This is merely the laboratory test with extraordinarily good condensation, using low temperatures which are not attainable in the Refinery.

X Q. That is a question about which you might be in error, might you not?

A. I know that Mr. Champlin's refinery does not use ice water or carbon dioxide snow to condense his gasoline. I don't need to go there to know that.

The Court: Of course, this is more interesting to the experts than it is to the jury.

Mr. Glasser: Of course we didn't start this, Judge.

[fol. 527] The Court. I know. Use your own judgment, but I am just calling attention to the fact that it is way over my head and over the jury's head.

Mr. Glasser: We regret the situation, but all of the Doctor's testimony yesterday was predicated upon these factors and we are simply trying to meet the issue; that is all.

The Court: Very well. Go ahead.

X Q. You didn't show anything in here about the sulphur content, did you, Doctor?

A. I don't remember about that.

X Q. Pardon me (passing document to witness).

A. No, there is nothing about the sulphur content there.

X Q. I believe you testified yesterday that it was your understanding and impression that the Garber and Tonkawa crudes had sulphur content of seventeen one-hundredths of one per cent?

A. No.

X Q. What did you say about that?

A. I said that gasoline made from those crudes usually has—by cracking usually has—sulphur content of about seventeen one-hundredths of a per cent.

X Q. Have you made any investigation or analysis of the cracked gasoline made at the Champlin plant in that respect?

A. I don't remember that I have.

X Q. From what plant have you made an investigation that disclosed a seventeen one-hundredths of a per cent from crude now, from those two fields?

A. I don't know that I could name specifically, except from general knowledge of Tonkawa crude; Globe Oil & Refining Company, and at Blackwell.

X Q. I will ask you, Doctor, if it is not a fact that the sulphur content at no time would ever exceed five one-hundredths of one per cent in any Tonkawa or Garber crude or any cracked gasoline made therefrom?

A. I think it has exceeded five one-hundredths of a per cent.

X Q. You think so?

A. Yes.

X Q. Now, referring to the matter of premium on cracked gasoline, about which you gave some testimony yesterday, did you know of any company in the Mid-Continent Field [fol. 528] that was getting a premium for their cracked gasoline during the period of time in controversy? I mean a substantial company.

A. You mean in 1925, '26 and '27?

X Q. 1926 and '27.

A. I don't know of any.

X Q. Are you acquainted with the Mid-Continent Petroleum Corporation at Tulsa?

A. Yes.

X Q. They have one of the substantial plants in the field?

A. I think the largest plant in Oklahoma.

X Q. I will ask you if it is not a fact that during the time in question they were getting as much as two cents a gallon premium for their cracked gasoline?

A. I didn't know anything about it.

X Q. Haven't been advised of that?

A. No.

X Q. Have you made any investigation to learn as to what the facts were at that time about that?

A. Yes, we tested gasoline for them and for many other refiners.

X Q. I am asking you now as to whether you made any investigation to learn what they were actually getting for their cracked gasoline?

A. I made no special investigation. I don't remember anything about what they were getting.

X Q. Who posts the prices of gasoline in the Mid-Continent field?

A. I don't know who posts the price on gasoline.

X Q. Who posts the price for that trade territory, do you know?

A. Everybody gets all he can get.

X Q. Well, there is one company that posts the price, isn't there?

A. There are certain factors. The Standard Oil of Indiana really dominates the price.

X Q. Covering thirteen states?

A. That doesn't refer to the tank car price at the refinery.

X Q. Refers to what?

A. The Chicago price in the Indiana District.

X Q. Does the Standard Oil of Indiana ever ask a premium or ever sell for a premium above the posted price?

A. In premium stations it sells premium gasoline.

[fol. 529] X Q. I am talking about cracked gasoline now. Does it ever sell cracked gasoline above the posted price?

A. It doesn't differentiate among different gasolines in tank car price.

X Q. Now, upon yesterday you made a small graph for the jury which disclosed a break in the price of gasoline that remained constant.

Mr. Glasser: Can we identify that exhibit quickly, Mr. Marsh?

The Court: Will you inquire quite a little more?

Mr. Glasser: Yes.

The Court: I think we will have to take a recess now of ten minutes.

(Recess.)

X Q. Referring to the exhibit which was marked Plaintiff's Exhibit K, I will ask you to briefly reiterate now the purpose of that graph in order that I may have it in connection with my next question?

A. The purpose is to show the general seasonal trend of gasoline prices.

X Q. Now, as I remember the graph, it was offered in connection with your examination as to the causes, in your opinion, for the fall of cracked gasoline prices?

A. No.

X Q. What bearing did the graph have upon the question?

A. I don't think that is for me to determine. I merely offered it as to the evidence.

X Q. What reason did you give yesterday in your testimony for the continuing fall in the price there, which was contrary to graphs and history during the four years prior thereto?

A. It was undoubtedly due—I remember I said—it was undoubtedly due to an overproduction of gasoline, reflected from an overproduction of crude oil, evidently.

X Q. You said that it was due to the greatly increased manufacture of cracked gasoline, did you not?

A. Without—I didn't mean to say that that had all to do with it,—but without the manufacture of cracked gasoline, that would not have occurred.

[fol. 530] X Q. In connection with the graph that has been offered as Plaintiff's Exhibit "K," I will ask you to examine page 103 of the oil price hand-book for 1926, Oklahoma, Kansas, eastern central Texas, etc. Crude Oil Prices. Will you take a given crude oil there of any specification of gravity that you care to assume—take, for instance 4040—and will you give me the price trend on the values of crude oils in the Oklahoma territory during the period of time in question? 1926?

A. The trend was upward until May, and downward from May on.

X Q. Now, referring—what was the extent of the upward trend from January 1 to the point in May—the high point in May? Just read each month?

A. It was fifty cents a barrel, a rise of fifty cents a barrel, in round numbers, and then a depression of fifty cents a barrel in the latter part of the year.

X Q. The answer is, perhaps, a little brief and will you kindly detail for each month, for us, the price trend in detail?

A. The price on December 31, 1925, which was practically the same as January 1st, was $2.11 for 40 41 gravity. And February 1st, it was $2.36.

X Q. Just go right ahead and read them?

A. The intervening months until May was not given—are not given here. But on May 15th, the price was $2.61. November 2nd, the price was $2.16, and on December 31, 1926, the end of the year, it was again $2.10.

X Q. Now, referring to page 114 in the oil price handbook for 1927, I will ask you to give me—and to give the jury—the same information with reference to the disclosure there in that year?

A. The price December 31, 1926, was $2.10. February 22, 1927, $1.83; March 5th, $1.50; March 12th, $1.36; December 31st, $1.36. The price trend was down throughout the year.

X Q. How does that price trend, on the period of time in question, compare with the graph you have made covering 1926 and '27, on the sale price of gasoline?

A. In 1927 it is essentially in the same general direction.

[fol. 531] X Q. Is that falling price on gasoline any more pronounced than the falling price on crude oil, as disclosed by these prices?

A. Yes, a little more. Well, considerably more. The price of gasoline dropped from something over nine cents—about nine and a half—down to something under six. That was about one-third off.

X Q. From the high point on the crude oil to the low point in the same period of time, give us the figures?

A. It was very close to the same.

X Q. Then would you say that the crude oil price had anything to do with the price of gasoline, as reflected by your graph?

A. Well, they all have an effect on each other. I don't know whether the crude oil affected the gasoline, or the gasoline affected the crude oil. But they were closely interrelated.

X Q. Which, in your judgment, had the great effect upon this continuing fall here—well, I will shorten the question—as compared with the previous history of the selling values of gasoline, the falling crude or the excessive manufacture of cracked gasoline?

A. The abnormal element was the overproduction of crude and the following prices of crude oil. Although the

dominating element in the petroleum industry is the stocks and the price of gasoline.

X Q. Now, yesterday Mr. Marsh asked you this question: "Do you have any opinion, or can you advise us, as to what caused the change indicated there in 1927 from the previous trend?" Referring to graph marked "K." Answer: "Yes. I have an opinion about it." Question: "Well, what was it?" Answer: "Too much gasoline to be sold." Question: "The question of cracked gasoline or straight run enter into that equation?" Answer: "Yes, very much." Question: "In what respect?" Answer: "Too much cracked gasoline being made." Question: "At that time?" Answer: "Yes." Now, you didn't take into consideration the fall in the value of crude oil at the time you gave Mr. Marsh that answer, did you, Doctor?

A. Yes. I didn't mean to say that was the entire factor. [fol. 532] Without cracked gasoline there would have been an underproduction of crude oil for gasoline requirements.

Mr. Glasser: I seem to have misquoted the record. This seems to have been questions I asked him on cross examination yesterday. Rather than questions asked by Mr. Marsh.

The Witness: Well, it doesn't make any difference.

Mr. Glasser: No. Except I wanted to keep the record straight.

X Q. Now, Dr. Cross, referring back to the methods that you detailed in response to Mr. Marsh's question, as to what might have been done by Mr. Champlin on the 16th day of September—and first with reference to your first method—your first proposal. As I understand your first proposal, you suggested the treating of the cracked gasoline with caustic solution and the "Doctor" and the blending up with the straight run. Is that the substance of your proposal?

A. Yes, sir.

X Q. With reference to your proposal, I will ask you what general classes of chemical compounds does untreated gasoline contain? Untreated cracked gasoline?

A. Well, the most important element, from the standpoint salability is sulphur compound known as mercaplen.

X Q. What other chemical compounds are included? More definitely denominated hydrocarbons?

A. Well, it contains paraffine hydrocarbons, aromatic hydrocarbons, naphthene hydrocarbons and olephene hydrocarbons.

X Q. Contains diolefene?

A. In a very small amount.

X Q. Now does the caustic and doctor treatment remove any of the above compounds?

A. No, the main purpose of the doctor solution, so called, is to convert the odoriferous substances such as mercaptin into sulphur compounds of less essential odor.

X Q. What happens to the diolefenes in standing in the presence of air?

A. In the presence of sunlight or other cataleptic agents they frequently polymerize.

[fol. 533] X Q. Tell the jury what you mean by polymerize so they will understand that, in lay language?

A. The lower boiling temperature of hydrocarbons is converted into a higher boiling temperature of hydrocarbons.

X Q. I feel that isn't clear yet. Will you go a little further on that, please?

A. Substances of lower gravity are converted into substances of a higher gravity, is about as clearly as I can put it.

X Q. Isn't it a fact that the diolefenes turn into a yellow resin or gum and find their way into the bottom of the storage chamber?

A. Not always; sometimes they do.

X Q. Would you say that they resinify?

A. They may under certain circumstances resinify.

X Q. What causes the yellow discoloration so often seen in the visible gasoline——

A. That is due in part to olefenes, different types of olefene compounds.

X Q. Would the Champlin gasoline when treated with caustic solution and the doctor and then in combination with straight run have produced this yellow discoloration in the bowl?

A. Not in the mixture that I suggested.

X Q. Now referring to the second method that you proposed yesterday, as we understand your proposal it was to acid treat the cracked gasoline, mix it with crude and run it through the skimming plant? Is that about the substance?

A. That was one of the methods.

Q. I am taking them up in the order now in which you submitted them on your direct examination. Now is that a clear statement of your proposal, to acid treat the cracked gasoline, mix it with crude and run it through the crude stills in the straight run plant, or skimming?

A. Generally speaking that is true.

X Q. What would be the effect on the kerosene naturally present in the crude if cracked gasoline is mixed with the crude and the process followed as you have enumerated?

A. The quantity if sufficient of course would affect the gravity.

[fol. 534] X Q. I am assuming the factors that you have in mind, the mixture as you proposed it?

A. As I proposed it it wouldn't have any serious effect.

X Q. Would it have any serious effect—how would it affect the color and burning qualities of the kerosene?

A. In small quantity it would be negligible.

X Q. Wouldn't materially affect it?

A. The gasoline put in is practically end point gasoline.

X Q. I am trying to get specific answers to these questions, and I will reread the question. How will it affect the color and the burning qualities of the kenosene?

A. It wouldn't materially affect it.

X Q. Immaterially affect it. If acid treated pressure distillate, which we concede to be the product as it comes from the Cross cracking plant, is re-run in a shell still, will a very high temperature throw the gasoline off color?

A. Your question is based upon a fact that doesn't exist in this particular case.

X Q. But we are assuming now that fact to exist in this particular case.

A. You can't assume that Cross cracked gasoline is pressure distillate.

X Q. We will take the word pressure distillate out then, and we will say if the product from the Cross cracking plant be acid treated and then re-run in a shell still, will a very high temperature throw the gasoline off color?

A. If re-run at high temperature, yes, it would.

Mr. Marsh: Wouldn't it be fair to have him define what he means by a high temperature?

A. I mean by high temperature the ordinary re-run in a skimming plant.

The Court: It would simply affect the value of his testimony.

X Q. What in your opinion is the maximum temperature at which it could be re-run?

A. Of course it is very difficult to draw any dividing line, but as a general thing temperature begins to go off around just below 400 degrees.

[fol. 535] X Q. Doctor, I fear that is not an answer to my question. What temperature is used in the last gasoline in the shell still crude battery?

A. That varies of course from temperatures of around 400 up to 700; even higher; it depends upon the operation.

X Q. I am asking you about sound practice.

A. Oh, it would all be sound practice.

X Q. What in your opinion should be the proper temperature in the last gasoline still in the Champlin battery of stills, using Tonkawa and Garber crude of the type that you analyzed?

A. For making gasoline only?

X Q. Yes. Well, in combination as you suggested in your second method.

A. I don't know the exact conditions existing there, but making a gasoline only the temperature need never exceed 437 degrees Fahrenheit.

X Q. What is the maximum temperature to which acid treated pressure distillate can be heated in a shell still? That is eliminated by your previous answer. Is it customary to use steam in the re-running of acid treated distillate? What is the usual practice?

X Q. How much steam in pounds per barrel of gasoline is necessary when pressure distillate is re-run at its maximum temperature?

A. Oh, the finishing temperature I presume is intended there. At least six pounds per barrel would be desirable.

X Q. Will the cracked gasoline be off color if run at the high temperature which is necessary in crude distillation?

A. To re-run, high temperature?

X Q. Yes.

A. I presume it is all acid treated?

X Q. This is all on the basis of the proposal of your second method.

A. Yes.

X Q. All of these questions, now I understand you mean

that all of these questions are predicated upon this general statement to acid treat the cracked gasoline and mix it with the crude and re-run it with the straight run?

A. Mix with the crude in the proportions given, it would not.

[fol. 536] X Q. Now would the re-running of this pressure distillate with crude reduce the capacity of the skimming plant accordingly?

A. Yes.

X Q. Would the matter of fractionating equipment to properly handle this mixture enter into your second proposal?

A. My second proposal was on the assumption that the fractionating equipment was only sufficient to take care of the crude process.

X Q. Now I will ask you, to summarize your second method, if the following difficulties would not have been presented, first, a total loss or practically total loss of kerosene, an off color value of the gasoline, and a loss of 20% of the straight run capacity in the skimming plant?

A. No, some of them would; not all.

X Q. Now what would?

A. The last one would.

X Q. There would be a loss of 20% straight run capacity, but you think the gasoline color would not be affected, and you think that the kerosene would not be materially injured or damages, or——

A. No.

X Q. That there would be no difficulty in that connection?

A. No, sir.

X Q. Now referring to the third method which you proposed as the liquid phase treating plant. Will you explain to the jury as nearly as you can in lay language how that system works and how it operates?

A. In that system the gasoline just as it comes from the cracking plant is mixed with sulphuric acid, of the strength of what is known as about 64 ordinarily, 64 Beaume. It is agitated very violently for as short a time and as low a temperature as possible or available at the refinery. It is then immediately introduced into a centrifuge in which the acid is separated. The gasoline is then introduced into an agitator, with which is introduced a priming powder, clay or Fuller's Earth. From this agitator the mixture of clay

and gasoline amounting in a typical instance one and one-half or two pounds of clay to the barrel of gasoline, is then pumped through a filter press directly to storage.

X Q. Does that complete the process?

A. That in general covers the process.

[fol. 537] X Q. Does that make a sweetened product?

A. That makes a sweetened product. I might say that before going to the acid it is usually treated with caustic.

X Q. How many pounds of what strength acid is used in that process?

A. Why, a typical instance, two pounds of 64 acid, Beaume.

X Q. Does that give a stable colored gasoline, that process?

A. Not perfectly stable.

X Q. Is the end point raised by the process?

A. Slightly.

X Q. How much?

A. Oh, possibly five to fifteen degrees.

X Q. How would that proportionate raise in the end point affect the gasoline yield?

A. It would affect the yield of 437 end point, but it would not affect the yield of U. S. motor.

X Q. How would it affect the yield of 437 end point?

A. Because it would be necessary in a cracking plant to cut at a lower temperature to allow for the increase in the end point.

X Q. Give us the quantitative calculation of it?

A. There might be as much as three to five per cent loss I should say.

X Q. What does the liquid phase treatment do to the gum content?

A. It reduces it in some respects, but doesn't entirely remove it. In the ordinary method of operation, when operating at low temperature, it does reduce it sufficiently to make the gasoline permanently stable.

X Q. Are there any liquid phase treaters in use to-day and, if so, where?

A. The last I heard of them, there were three in use.

X Q. Will you give us the locations, please?

A. The Simms Oil Company at Dallas, The Simms Oil at Smackover, Arkansas, and the Globe Oil & Refining Company at Blackwell, Oklahoma. I can't say from my own knowledge as to that.

X Q. What is the volumetric loss of the gasoline in use in this method of treatment?

A. Oh, about two per cent.

X Q. Now you spoke of a centrifuge being necessary in the use of this treatment. What period of time do manufacturers give on centrifuges for handling acid sludges, [fol. 538] filter pressure, and large settling drums—period of delivery?

A. The last I heard of this particular centrifuge, six weeks; but normally it will take a long time because of a special centrifuge.

X Q. We are asking about the last part of your answer. What do you mean by normally it would take a long time?

A. If the centrifuge were not available, it would take a long time to make a special centrifuge.

X Q. How long would it take in your opinion?

A. I couldn't say.

X Q. Your best judgment?

A. In this particular type of centrifuge we have been offered six weeks delivery.

X Q. In response to Mr. Marsh's question on Page 621 of the record, "How long would it have taken to have gotten that installed?" The answer is, "About six weeks."

A. Yes, that was based upon the time for the centrifuge.

X Q. The answer had indicated to us a completed plant. "How long would it have taken to have gotten that installed," and your answer "About six weeks." Now you mean that was the time it would have taken to have gotten the centrifuge?

A. Everything else could have been put in more quickly. The centrifuge thus would be the thing requiring the longest time for delivery.

X Q. If it required six weeks in your judgment to get the centrifuge, the installation could not have been completed within that time, could it, Doctor?

A. With a matter of just a few hours at the outside to install the centrifuge.

X Q. Now you testified also on a fourth method, at Page 621 of the Record, wherein this question was asked: "You have not referred to the Gray process?" "The Gray process could also have been used." Now the Gray process was a patented process, was it not?

A. That is my understanding.

X Q. And involved a royalty of six cents a barrel?

A. Yes, sir.

X Q. And before we could have used the Gray process, we would have been required to pay the six cents per bar-
[fol. 539] rel on all of the volume that would go through it?

A. That is my understanding.

X Q. For as long a period of time as we would have used it?

A. I don't know the terms, but my understanding is the current royalty is six cents per barrel of gasoline.

X Q. You submitted a fifth plan that might have been adopted at Page 624 of the Record, wherein Mr. Marsh asked you concerning a proposed re-running: "Q. How long would it take in your opinion to re-run 170,000 barrels of the unfinished Cross cracked gasoline through the two 2000-barrel Cross cracking units at the Champlin Refining Company?

A. I believe it could have been done in about two months." Now will you briefly restate to the jury the process there that you intended under that fifth method?

Mr. Marsh: I think my brother is in error. That is not my fifth method. I think that appears at the bottom of Page 621.

Mr. Glasser: Perhaps I overlooked one.

Mr. Marsh: I was asking about the period of the summer when re-running.

Mr. Glasser: I assumed all those questions at the bottom of Page 621 had to do with the Gray process.

Mr. Marsh: No.

Mr. Glasser: But at least the so-called Cross vapor phase tower.

X Q. The questions with reference to copperized clay from the bottom of Page 621 to the bottom of Page 623 had to do with impregnating Fuller's Earth in a process similar to the Gray process with copper in order that you could get a doctor sweet product. Isn't that correct? Is that what you mean by that?

A. To reduce the sulphur and get a doctor sweet product, yes.

X Q. The question was, "Based on your laboratory experience with this copperized clay treatment, would it have been feasible or what would have been the cost, I will say, to treat this gasoline by using copperized clay in the type of towers that were actually installed by the Champlin Re-

[fol. 540] fining Company?" That simply was the addition of the copper to the Gray process, was it not? Is that what you meant by that?

A. Well, that could have been done. Anybody could have done that of course, if they cared to do it.

X Q. I am just trying to get at the method you were proposing.

A. Similar to the Gray process.

X Q. Except you meant the copper might have been added?

A. Yes. That was experiment. That was experimental of course.

X Q. The substance of your testimony in that respect, with reference to the Gray process and then the addition of the copper clay in a similar process, would present a situation so that if the copper hadn't been used and the towers had been constructed in accordance with the old German patent by which you were informed, Champlin would then have practically the Gray process in the German treating tower, would he not?

A. I don't recollect the exact design of the German process, but in principle the basis was the same.

X Q. All right. Now with further reference to what we term the fifth method, that is, the re-running through the Cross cracking plant, you answered that you believed it could be done in about two months. "You are assuming what rate per day, per unit? "That assumes about close to 1700 barrels a day." "Now, Dr. Cross, in order to re-run that gasoline and handle it properly, would there have been any necessity for additional fractionating equipment, additional to what was installed in connection with the cracking units?" Answer: "Not if you are running it through the cracking plant." Now, with reference to that method, I will ask you state what each of the 2000-barrel cool-oil units are guaranteed to make in gasoline per day?

A. I don't know what the guarantee was.

X Q. Isn't it 650 barrels?

A. That is the usual practice.

X Q. How many square feet of condensing and cooling surfaces were installed in the gasoline condensers in the Champlin units?

A. I don't know.

[fol. 541] X Q. Well, they were standard units, were they not?

A. I have never seen the particular units.

X Q. You are informed as to the standard units?

A. I was basing my answer upon the capacity of the plant, the amount that was condensed, and the amount that was cracked.

X Q. In the installation of the Champlin plant, what size pipe was used?

A. I know what you are driving at, and I can answer you all in one answer if I may. The method proposed to use involved the putting through of more gasoline than the original charge, but the limit in the furnace end was largely the ability to put a certain given amount of heat into the oil. If the same amount of heat was put into the gasoline as was put into the charging stock for the cracking plant, it would handle approximately two and one-half times as much. The fractionating equipment capacity is governed largely by the ability to reflux down the pipes from one pan to another, and on re-running very little refluxing or running down through these pipes and the trays is required. In any case all that is necessary to increase the fractionating equipment is to operate at higher pressure. At a pressure of 45 pounds with any given fractionating equipment it is possible to handle approximately three times as much as at atmospheric pressure. The chief limitation to this plant, these plants for re-running, was in the condenser coils, and this is overcome, could be overcome in this case, by more rapid circulation of the condensing water in the boxes and by holding the condenser under some pressure.

X Q. Now would you say that the Champlin gasoline condenser would be sufficient to condense and cool about 1700 barrels of gasoline in twenty-four hours, when it was designed for 650 barrels? Is that the substance of your answer?

A. The exact amount would not be 1700. I will figure it exactly. It now really would be about 1420 barrels.

X Q. Then the answer of yesterday is changed to that extent?

A. Yes, sir.

X Q. Then I will ask the question in this form: Would you say that the Champlin's gasoline condenser would be [fol. 542] sufficient to condense and cool about 1420 barrels

of gasoline per 24 hours when it was designed for 650 barrels?

A. Yes, with the modifications I have already set out.

X Q. Will you explain how you would propose to run the Cross unit on the acid treated pressure distillate?

A. I would run it in the same manner that it was run for cracking except that more oil would be pumped through it at high speed. I would send it through the reaction chamber in the same manner.

X Q. Would that method involve the use of steam?

A. Steam could be used in the vaporizer towers if desired, but it would not be necessary.

Q. Well, if in the course of the operation you found it was necessary, how many pounds per barrel should be used, in your judgment?

A. If it became necessary one pound would be ample with a good fractionating tower.

X Q. Would the method which you are proposing in this connection leave any gasoline in the pressure distillate bottoms?

A. Yes; undoubtedly there would be some accumulation.

X Q. Would that be lost?

A. That would be lost.

X Q. That would be quite expensive, would it not, doctor?

A. Why, that would amount to, subsequent to acid treating, two or three per cent; five per cent at the outside, I would say.

X Q. And if this method had been utilized to what temperature would the pressure distillate be heated to leave the tube still?

A. It would be still heated to 400 degrees Fahrenheit.

X Q. What would be the temperature drop by radiation lost through the reaction chamber in running pressure distillate in the Cross unit?

A. There would be very little.

X Q. Would you anticipate that if a high enough temperature were carried on the tube still to compensate for the loss of temperature through the reaction chamber that this would be so excessive as to discolor the overhead gasoline in this re-running operation?

A. No.

X Q. It would not?

A. No.

[fol. 543] X Q. At the opening of my examination to-day when I asked you about your connection with the Gasoline Products Company and your interest in this litigation, I understand you to say that your interest was limited to two per cent. Did you refer to the stock in the Gasoline Company or did you refer to the royalty?

A. I referred to both.

X Q. Will you be a little more clearer in that? We do not seem to understand that answer which you gave?

A. I have a commission in the royalties, and also formerly owned stock in the Gasoline Products Company.

X Q. The commission that you have in the royalty is on the ten cents per barrel covered by the license contract on the throughput or charging stock that goes into the Cross units? Is that correct?

A. Yes, sir.

X Q. And is that in addition to the two per cent that you refer to?

A. That two per cent isn't very accurate. It is a guess. I haven't enough information to give it to you accurate, there are so many complications entering into it.

X Q. What we are particularly concerned about is the interest that you have in the license contract, in the ten cents per barrel?

A. Why, the percentage interest?

X Q. Whatever that interest may be?

A. On this particular case?

X Q. On this particular license?

A. I haven't the information to answer that correctly or even very closely.

X Q. Aren't you able to give any information as to your ownership in the license contract?

A. There are so many contracts entered into in the last few years it would make the calculation very uncertain in my mind.

X Q. I ask you if it is not a fact that you have one cent out of each ten cents from the contract? You and your brother?

A. No.

X Q. Do you and your brother in the Kansas City testing laboratory have one cent out of each ten?

A. No.

[fol. 544] X Q. Do you have as much as one-half of one cent out of each ten?

A. We formerly did.

X Q. What change has there been that has modified that in any way?

A. I don't think I am competent to give the facts about that. Anything I give is very inaccurate; but there has been a change of stock ownership and transfer of this commission contract to which you refer, and I confess that I am at a loss to know just what my position is in respect to this matter at this time.

X Q. Are you able to give us the information with reference to the period of time which was involved in the making of this contract in 1926?

A. At that time my interest would have been approximately one-quarter of one cent per barrel.

X Q. And the total interest of yourself and brother would have been approximately one-half of one cent out of each ten cents royalty?

A. Yes.

X Q. You were practically the sole owners of the Cross Development Corporation were you?

A. No.

X Q. What portion did you have stock in that company—you and your brother?

A. I had eleven per cent approximately.

Mr. Hale: We will stipulate that it was forty-four per cent—he and his brother.

By Mr. Glasser:

X Q. Was there any change in ownership that vested an interest in this royalty in any members of your family in lieu of ownership in your name?

A. No; my brother and I owned such stock and had such interest as any members of our family; that is, no other members of the family had any.

Mr. Marsh: Before taking up the re-direct examination I would like to correct a few small errors in the record of Dr. Cross's testimony yesterday. We want to supply on page 592 the exhibit number of that exhibit 3 in the Gray deposition, which was the same as "Defendant's Exhibit

59"; and on page 626 there was a reference to the Marland plant at Ponca City. That is misspelled.

[fol. 545] Then at the top of page 627 was a reference to the Simms Oil Company in Dallas, on the first line. That was referred to incorrectly as the Standard Oil Company in Dallas.

On page 642, in two places on the second and third lines from the bottom the expression "electric phase" should read "liquid phase."

Then on page 643, in the answer to one of Mr. Glasser's questions, reference was made in the third line to "anti-knock province," which should read "anti-knock properties."

Afternoon Session (April 30, 1929)

The Court came in at one o'clock p. m., eastern standard time, and the taking of testimony proceeded as follows:

Redirect examination.

By Mr. Marsh:

Q. Dr. Cross, you testified yesterday with reference to the cost that would be involved in installing acid treaters of sufficient capacity to treat the cracked gasoline received from the Cross cracking units at Champlin. Will you state how long it would take to install those treaters?

A. Those would be continuous treaters and would take, I would say, not over six months at the outside.

Q. In cross examination to-day you were asked what size towers you would recommend for use in treating this cracked gasoline, and you replied, as I remember it, eight by ten feet. Did you not?

Mr. McKeever: Eight by twelve feet.

Mr. Marsh: Eight by twelve? Thank you.

Q. Eight by twelve feet. Will you state how many towers of that size there would have been required?

A. Three.

Q. Three?

A. With the single tower on each unit. Of course a combination of two towers on each unit has been contemplated. I don't know whether they were on this installation or not.

[fol. 546] Q. At the time you discussed the vapor phase treating process with Mr. Keith, were you familiar with the contents of any applications for patents which had been applied for by Mr. Gray then pending in the patent office?

A. No, I was not.

Q. Are you familiar with the contents of such applications now?

A. No.

Q. Would the knowledge of the contents of those applications have affected your opinion?

Mr. McKeever: I object. It is immaterial at this time, it seems to me.

The Court: I think he may answer.

A. Yes. It might have had——

Q. Of course, it would depend upon what was in the applications, would it not?

A. Yes.

Q. Will you state whether those applications can be examined in the patent office by anyone?

A. No. They aren't available, except to the attorneys of the inventor.

Q. They are secret, are they not?

A. Yes.

Q. I show you letter of February 6th, from Mr. Keith to the Champlin Refining Company,—if I can find it.

Mr. McKeever: It is number three.

Q. And I ask you to tell whether—I ask you to state there what specific information contained in that letter was conveyed by you to Mr. Keith before the date when he wrote the letter?

A. The information which I conveyed to Mr. Keith related to the quality of the gasoline produced, and is shown in the latter part of the second paragraph of the letter.

Q. Will you read that portion of it which was based on such information?

A. (Reading): "Unit shall be said to be satisfactory when the gasoline produced from it has a color, when measured by a standard Seybold color machine, as ordinarily used in the refining industry, of 25 or better, is sweet to the doctor test, as ordinarily understood, passes the copper strip corrosion test, and after eight hours con-

tinuous exposure to the sun, still has a color of twenty-one or better."

[fol. 547] Q. And you didn't give him any more information than that, so far as the letter was concerned?

A. I did not.

Q. In cross examination you were asked as to the sulphur content of the Seybold crude, and I am not certain that the jury understood to which you directed your answers. Will you state now the sulphur content of the crude, then the gas oil, and then the cracked gasoline made from it, if you will?

A. The sulphur content of the crude is very low. I don't remember the exact figure; and the sulphur content of the gas oil and fuel oil is very much higher, because the sulphur accumulates or concentrates in those fractions.

Q. Did you estimate a percentage there, as to those?

A. I didn't give any estimate as to the percentage.

Q. Can you or are you in a position to estimate what the gas oil would contain?

A. I think that it runs about——

Mr. McKeever: Well, if Your Honor please, we object to that.

Mr. Marsh: I simply want to clear this up.

Mr. McKeever: That doesn't go into the realm of an expert witness. He has asked if he knows this is a matter of fact, and his opinion as to what he contends with reference to this sulphur content wouldn't make any difference.

Mr. Marsh: I am simply asking him to state it, if he knows it.

The Court: I rule that he may answer.

(Exception allowed and noted.)

A. About twenty-five one hundredths of one per cent.

Q. Then what would be the sulphur content of the cracked gasoline made from that oil?

A. About seventeen one-hundredths of one per cent.

Q. And that was the figure, I believe, you gave Mr. McKeever on cross examination?

A. Yes. My testimony was based on that sulphur content.

[fol. 548] Q. In stating the time which it would take to re-run that cracked gasoline, 170,000 barrels, through the two Cross cracking units, you corrected your testimony this

morning to state that it would be at the rate of approximately 1420 barrels a day. How many days' running at that rate would be required?

A. Sixty days.

Q. In connection with that same line of testimony, you were examined as to the capacity of the condensers attached to the cracking units. Could you make any assumption as to the basis of that answer with reference to the——

A. (Interrupting): I assumed that the gasoline would be condensed in the recycled stock or recharging stock accumulated, as well as in its regular condensor.

Q. Referring to the so-called five methods which you have suggested which were available to the Champlin Refining Company as a means of treating this product of the Cross cracking units before they completed their own tower, which method would be the preferred method in your opinion, of those which you have named?

A. The preferred method would be the vapor phase treating.

Q. Which would have been the most inexpensive method at that time and under the conditions which you would have had to face at that time?

A. The treating and blending with the straight run gasoline. The treating with the "doctor" and blending with the straight run gasoline would have been the cheapest.

Q. Yes. You testified that the total cost would have been ten thousand dollars, including the apparatus? Is that right?

A. It would be approximately two cents per barrel.

Q. And then the apparatus cost was something in addition, wasn't it?

A. It would be around five thousand dollars.

Q. Now, the gasoline which would be produced by that belding operation, is that—state how you would describe that gasoline, with reference to the hand-book of prices?

A. It would be sold the same as 437 end point gasoline. The gravity would be not seriously different from the gravity of the straight run gasoline normally sold.

[fol. 549] Q. What would have been the gravity approximately of the mixture?

A. I don't know what the gravity of the straight run gasoline was. I would have to make certain assumptions.

Q. Well, assuming—no, I can't make assumptions, for I don't know what the gasoline was—Well, assuming that the straight run gasoline was sixty—sixty-two, U. S. gasoline, 437 end point?

A. The gravity would be reduced very slightly by the addition of the treated cracked gasoline.

Q. Then assuming that the straight run gasoline was U. S. gasoline 58-60 and 437 end point?

A. The cracked gasoline would probably have been within that range, so that there would have been no effect on the gravity in that case.

Q. Now will you state approximately what percentage of the total amount of gasoline sold in the United States in 1926 and 1927 would come up to the standard of 58-60 U. S. gasoline of 437 end point?

A. Most of the gasoline sold has a gravity below 60. I would say that three-fourths of the gasoline sold in the United States has a gravity below 60.

Q. This mixed gasoline then, how would that place with reference to the total amount of gasoline in the range of gravity?

A. It would have been normal, marketable gasoline.

Q. Can you say of your own knowledge whether gasoline of that type was sold in quantity to retailers and marketers of gasoline?

A. Yes.

Q. In quantities?

A. Yes, sir.

Q. That is based upon your own knowledge of actual cases?

A. Yes.

Q. Would it be necessary in sales of that kind for the refiner to use a brand name in order to secure the price?

A. No.

Q. Is it customary?

A. Some refiners of course sell under a brand name. Many of them sell to marketers and brokers.

Q. Do the marketers and brokers sell under the brand name necessarily of the refiner from whom they purchase?

A. The marketers often have their own brand. Brokers usually do not.

[fol. 550] Q. What do the brokers do with gasoline?

A. They sell to marketers; as a general thing sell to marketers.

Q. Then what do the marketers do with it?

A. They sell to the trade.

Q. There is one more question. When you testified on the cross examination that when this cracked gasoline was rerun in the crude still, shell still, it wouldn't lose color. Will you state how you intended to charge that gasoline to the crude still?

A. That would be charged into the towers—the fractionating towers of the crude still.

Q. And at what temperature? What would be the temperature in those towers?

A. It wouldn't exceed 400 at any point.

Q. Your answer with reference to color was based on that method of charging, was it not?

A. Yes.

Mr. Marsh: I think that is all.

Mr. Hale: Your Honor please, in the record yesterday, page 639, at the foot of the page, the word "labor" should be "label," "dishonest in label."

The Court: The reporter will take care of that.

Mr. McKeever: While they are conferring in connection with the correction of the record, I would like to ask permission before we close to correct several little places in our record.

The Court: Yes.

Mr. McKeever: I didn't do that yet.

The Court: We will get them all together sometime.

Cross-examination resumed.

By Mr. Glasser:

X Q. Did I understand, Doctor, that your testimony since the noon hour in reference to the letter that Mr. Keith in no wise changed your testimony given this morning in connection therewith?

A. I didn't intend that it should. I expressed myself clearly on it.

X Q. I understand you to say this morning that you made very clear to Mr. Keith before he went to Enid in the latter days of January that this was an impracticable pro-

[fol. 551] cess or that there was some difficulty about it?

A. I made it clear to him there were difficulties about it, I think.

X Q. Now this answer that you just gave when Mr. Marsh referred you to that letter, did you undertake to eliminate any of the difficulties that you talked about this morning?

A. No. I merely meant to say that I advised him of the quality of the gasoline which might be affected in this process were successful——

X Q. Does your answer given since the noon hour in any wise limit Mr. Keith's letter as against your testimony given this morning in connection with it?

A. Not as I understand it.

X Q. Now with reference to the matters that Mr. Marsh has been questioning you about. What do you think the pressure drop would be passing 650 barrels of gasoline plus the usual amount of fixed gas vapor through an 8 by 12 clay tower containing 30 or 60 mesh clay?

A. Purely a guess on my part.

X Q. That is what I want. Your guess on it.

A. It wouldn't exceed five pounds.

X Q. Do you know the size of the line—strike that out. Are you advised of the size of the line from the Champlin reaction chamber to the vaporizer, standard Cross unit?

A. I am not sure as to that size.

X Q. What in your opinion would be—what is your best recollection about that?

A. I suppose about a three-inch line.

X Q. You state that the gravity of 60-62 straight run gasoline would be reduced only slightly by the addition of cracked gasoline, I believe?

A. Yes, one-fifth of the total would be the cracked gasoline, so it would reduce it very slightly. Possibly three- or four-tenths of a point.

X Q. Three- or four-tenths of one point?

A. Yes.

Mr. Glasser: That is all.

Mr. Marsh: I have nothing more.

[fol. 552] CHARLES H. WELLING, recalled for plaintiffs, testified:

Direct examination resumed.

By Mr. Marsh:

Mr. Marsh: You want to stipulate these into the record?
Mr. McKeever: Let him swear.

Q. Mr. Welling, where were you yesterday?
A. In New York.
Q. I show you this book and ask you to state whether you produced that from the files of the Cross Development Company?
A. I did.
Q. What is it?
A. A minute book of the Cross Development Corporation.
Q. Will you refer to Article 3 Section 1 of the by-laws and read that into the record?

Mr. McKeever: Just a minute. May I have the privilege of looking it over?
The Court: You may.
Mr. McKeever: Before he asks that question. (Examines.)

(Examined by Mr. McKeever.)

X Q. Mr. Welling, is this book the original?
A. Yes, sir.
X Q. Made at the time these entries are purported to be made by the dates?
A. Yes, sir.

Direct examination resumed.

By Mr. Marsh:

Q. Read Section 1. Read the first paragraph. The remaining paragraphs are not concerned.
A. Executive officers. The executive officers of the corporation shall consist of president and a vice president, each of whom shall be elected from among the members of the board of directors and also a secretary and treasurer who need not be elected from members of the board. The board may create such other executive officers including ad-

ditional vice presidents who need not be members of the board, and in its judgment may be necessary for the proper management of the affairs of the corporation. It shall be [fol. 553] the duty of the board to elect executive officers at its first meeting after the annual election of directors in each year.

Q. You don't want the balance of that paragraph there?

Mr. McKeever: No.

Q. That by-law has not been amended, has it, Mr. Welling?

A. No.

Q. I now turn to the minutes of the meeting of the board of directors held on December 17, 1924, and ask you to read from the bottom of the first page down to the list of officers elected at that meeting?

A. The meeting then proceeded to the election of officers and the following persons were thereupon unanimously elected to the offices set opposite their names: Frederick Osborne, president; Walter M. Cross, vice president; Roy Cross, C. H. Welling, vice presidents; H. G. Atwater, vice president; W. S. Hood, secretary; W. S. Hood, treasurer.

Q. Now turn to the minutes of the meeting of the board of directors held on March 11, 1925, and I ask you to read the passage from page 1 of those minutes relation to the election of officers?

A. The following persons were thereupon nominated and seconded for officers of the company: For president, Frederick Osborne; for vice president, Walter M. Cross, Roy Cross, H. G. Atwater, C. H. Welling; for treasurer, W. S. Hood; for secretary, W. S. Hood; for assistant treasurer, B. H. H. Noble; for assistant secretary, B. H. H. Noble. There being no other nominations same were duly declared closed. A vote being taken the chairman announced that the above mentioned persons had been unanimously elected to the offices to which they had been respectively nominated, and would hold office until the next annual meeting of the stockholders and until their successors should be elected and qualified.

Q. Now, turn to the minutes of the meeting of the board of directors held on May 12, 1926. I ask you to read there the portion relating to the election of officers?

A. (Reading): The following persons were thereupon nominated and seconded for officers of the company. For [fol. 554] president, Frederick Osborne; vice presidents, W. M. Cross, Roy Cross, H. G. Atwater, C. H. Welling; treasurer, W. S. Hood; secretary, W. S. Hood; assistant treasurer, H. L. Abbott; assistant secretary, H. L. Abbott, closed. A vote being taken, the chairman announced that the above-mentioned persons had been unanimously elected to the offices to which they had been respectively nominated and would hold office until the next annual meeting of the stockholders and until their successors should be elected and qualified.

Mr. Marsh: I don't believe it will be necessary to carry that through any further.

Mr. McKeever: What year is that?

Mr. Marsh: 1926.

Mr. McKeever: That covers it.

Mr. Marsh: You want to run it down to date?

Mr. McKeever: No.

By Mr. Marsh:

Q. Now, Mr. Welling, when you were in New York City did you examine the files of the Cross Development Corporation?

A. I did.

Q. Did you find a copy of the letter of January 9, 1926, which has been introduced in evidence here as Plaintiff's Exhibit F and of which another copy was introduced in evidence as Defendant's Ex. 65, I think?

A. I did.

Q. Will you produce that copy?

A. (The witness produces a document.)

The Court: A copy is that?

Mr. Marsh: This is the file copy.

The Court: This is the carbon?

Mr. Marsh: Yes, sir.

Q. I ask you to state whether that is the carbon copy of the original letter that was delivered by you to Mr. Keith on that day?

A. That is the carbon copy of it, of the original that I signed and delivered to Mr. Keith.

Mr. Marsh: Now I offer to have that compared with the two copies that are already in the file.

[fol. 555] Mr. McKeever: Let me see it? I can tell.

The Court: Just offer it in evidence. That is all you want to do.

Mr. McKeever: It is admitted that is the same language.

Mr. Marsh: There is no purpose in encumbering the record with it unless you wish it.

Mr. McKeever: I merely admit it is the same.

The Court: Offer it in evidence.

Mr. Marsh: I offer this in evidence and ask to have it marked.

(Copy referred to marked "Plaintiff's Exhibit No. L" and admitted in evidence.)

Plaintiff's Exhibit L is identical with Plaintiff's Exhibit F printed on page 370 of this record and also is the same as Defendant's Exhibit 65 printed on page 745 of this record.

Mr. Marsh: Mr. Welling has compared his original file of the deGanahl correspondence with the copies which were introduced in evidence, and they are substantially correct with certain minor corrections which are largely verbal, and my suggestion would be that we simply correct the copies introduced as exhibits so as to conform with the file copies.

Mr. McKeever: Mr. Marsh asked me about that, and I agreed that that might be done. No objection at all.

The Court: Any questions of this witness?

Mr. McKeever: No, sir, that is all.

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Thomas E. Schofield, called for the plaintiff, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Hale:

Q. What is your name, Mr. Schofield?
A. Thomas E. Schofield.
Q. Where do you live?
A. Kansas City, Missouri.
Q. What is your business?

A. I am a patent lawyer.

Q. Are you a member of the Bar of some state or states?

A. I am a member of the Bars of Illinois and Missouri.

Q. How long have you been engaged in the practice of law?

A. Since 1917.

[fol. 556] Q. During that period have you been engaged entirely in patent practice?

A. Since 1917, yes, sir.

Q. Were you so engaged in January, 1926, and February, 1926?

A. I was.

Q. Where did you have your office at that time?

A. At 500 Keith & Perry Building, Kansas City, Missouri.

Q. Do you know H. H. Champlin, the president of the Champlin Refining Company?

A. Yes, sir.

Q. That is the gentleman who sits over here behind me?

A. Yes, sir.

Q. How many times have you ever met him?

A. Well, I met him last year here at the trial, and I met him once before in Enid, Oklahoma.

Q. What were the circumstances of your meeting him in Enid, Oklahoma?

A. I received a wire from P. C. Keith, Jr., when I was in New York.

Q. Don't say what was in it.

A. And as a result of that wire I went to Enid, Oklahoma.

Q. Did you go there alone?

A. As I recall it I went with Mr. Keith. I won't be sure about that, but that is my recollection.

Q. Do you know when you went there?

A. I went there on the night of February 11th and was in Enid on February 12th, 1926.

Q. Did you go there more than once?

A. That is the only time I have ever been in Enid, Oklahoma.

Q. What, if anything, enables you to fix the date of that visit to Enid?

A. Well, I am able to fix that date by my daily entries, that is, my office entries on which I make my charges.

Q. Do you know where you were, Mr. Schofield, from February 1, 1926, through February 11th?

A. Well, I can refer to my entry book and tell you about that.

Q. Will you do so, please?

A. (Referring to book.) I have an entry here.

Q. Don't give the entry?

A. From February 1st to February 9th I was on a trip to New York and Washington.

[fol. 557] Q. From where?

A. February 1st to February 9th.

Q. No; to Washington from what place?

A. From Kansas City I went to New York and Washington; then returned to Kansas City. February 10th I was back in Kansas City. February 11th I was in Kansas City, and on February 12th I was in Enid, Oklahoma, with Mr. Keith.

Q. That is, you left Kansas City on the night train on the 11th?

A. That is correct.

Q. Do you recall what you did when you got to Enid?

A. My recollection is a little vague as to what time of day we arrived in Enid, but I do recall that it was either in the early afternoon or late in the morning. Mr. Keith and I drove down to the refinery, Mr. Champlin's refinery, at Enid, Oklahoma, and then later in the evening we went back to the hotel. After dinner, after supper, in the evening, Mr. Champlin came in, and Mr. Keith got a room in the hotel and we went up into this room. And I can recall that we at that time discussed the Gray patent and German patents and other patents that had to do with the Gray patent, which I thought had to do with the Gray patent. We also discussed, as I recalll it, oh, the general cracking situation, that is, the general situation as to the cracking patents. That latter discussion was rather general.

Q. What had been the subject of your discussion in the meeting in the afternoon at the refinery?

A. I haven't any clear recollection of what that discussion was. We, I think, saw Mr. Phil Slater out there, but we just met him and talked generally, but I have no recollection of the discussion at that time.

Q. But the discussion in the evening was with reference to patents?

A. I recall that very vividly.

Q. Now will you state the purport of what you said at that meeting, or state what you said as nearly as you can recollect?

A. As I recollect, we were discussing the Gray patent.

Q. Gray patent on what?

A. On vapor phase treating.

Q. Is that a process patent or a product patent?

A. That is a process patent.

[fol. 558] Q. What do you mean by a process patent?

A. I mean that the claims of the patent are drawn to the process, that is, the claims describe the process which is in the specifications of the patent. And we went over this patent, and I called Mr. Champlin's attention to certain patents which I thought constituted anticipations substantially of the broad idea of vapor phase treating, that is, I told him at that time, as I recall, that the broad idea of vapor phase treating with Fuller's Earth, passing hydrocarbon vapors through the Fuller's Earth, was broadly covered in the prior art, and I showed him these patents which I relied upon. Among them were the German patent to Baynes, Fearenside, and a British patent I think to Thompson.

Q. Is that German patent the one which is in evidence here as Defendant's Exhibit 5?

A. Yes, that is the German patent and it is to Baynes, Fearenside and Thompson. There are three patentees.

Q. That is the one that you discussed at Enid?

A. That is one of the patents. There was another patent to Thompson alone, I think, which was a British patent.

Q. Did you express any definite opinion on the scope or validity of the Gray patent on the Gray treating process so called?

A. I told Mr. Champlin that I thought that the scope of the Gray patent was relatively limited due to these two outstanding patents.

Q. Did you discuss the Cross vapor phase treating system?

A. Well, I think that Mr. Champlin asked me with reference to what patent protection we had, and I told him about the one patent issued and that we had other patents, applications, pending in the patent office.

Q. Was the patent you had issued a process patent or product patent?

A. The patent which we had issued at that time was a product patent on the mixture of a clay with copper. It was a product patent.

[fol. 559] Q. That is, Mr. Schofield, if I understand correctly, the Cross Development Corporation had no patent on the towers as such; is that right?

A. Not at that time.

Q. But did have a patent on the copperized clay?

A. It had a product patent on the copperized clay.

Q. I am not quite sure that either the jury or I apprehend fully the distinction between a product patent and a process patent.

A. In a process patent the claims of the patent are drawn to the process. To give you an example, a process claim or a process patent upon vapor phase treating would read such as this—A method for passing oil vapors through a bed of Fuller's Earth. That would be a process claim. A product claim would be a claim such as this, or a patent, a product patent, in which there are product claims, would be a claim such as the following—a material for treating oil vapors consisting of Fuller's Earth combined with metallic copper. I don't know whether I make myself clear, but that is the general idea.

Q. I think you do, Mr. Schofield. Now, with reference to patent applications, are they public or not?

A. A patent application is sacred between the inventor and the Patent Office until the patent is issued, and when the patent is issued the patent is public.

Q. Of course when you were in Enid you had no knowledge of any applications for patents with reference to vapor phase treating?

A. Well, I had knowledge of the applications for patent that were filed by the Cross Development Company.

Q. But I mean by other people?

A. Others I did not.

Q. I believe you stated that it was Mr. Keith who asked you to go to Enid?

A. Yes; Mr. Keith requested me to go to Enid.

Q. When you went to Enid were you informed as to the details of any negotiations with Champlin or the Champlin

Refining Company for the installation or licensing of either a Cross cracking plant or a Cross vapor phase treating plant?

A. All I knew was that they were negotiating.

[fol. 560] Q. Did I understand you to testify that at this same meeting you discussed the Cross cracking patents?

A. Yes; we discussed not only the Cross, but I think that we also discussed other cracking processes and other cracking patents at that time, and it is my recollection that I told Mr. Champlin that I thought that the Cross processes patents were in about as good a condition or position in the industry as any of the others.

Q. Did Mr. Champlin say anything about these patents while you were there?

A. I don't know as I know just what patents you are referring to?

Q. Any patents? What did he say in general?

A. Well, I don't recall that Mr. Champlin did anything further than just inquire generally; first, about the vapor phase treating situation, and then this general discussion with reference to the cracking patents situation. I know that he was interested to know about the scope of the Gray patent and that was my purpose in going to Enid, Oklahoma.

Q. After you returned from New York did you send Mr. Champlin some documents?

A. Yes; I sent Mr. Champlin on two occasions documents. The first time I think I sent him copies of the Gray file wrapper. That is the prosecution of the application through the Patent Office up to its issuance. After the patent is issued anyone can procure from the Patent Office the file history of the patent during its prosecution, so you may be able to ascertain from that whether the prosecution was regular through the Patent Office or whether it was irregular; what difficulties were met during the prosecution; and I sent Mr. Champlin a copy of the Gray file wrapper. I also sent him photostatic copies of the German patent, and I think I also sent him a copy of the British patent. I sent the first batch to Baltimore, to Mr. Champlin, at Mr. Keith's suggestion; and then after he returned to Oklahoma I again sent him another copy of the Gray file wrapper I think.

Q. You mean after Champlin returned?

A. After Mr. Champlin had returned from Baltimore I [fol. 561] sent him another copy of the Gray file wrapper, and I think I duplicated the photostatic copies of the patent.

Q. Did you send him letters of transmittal with those different documents?

A. I did.

Q. Have you copies of those letters?

A. Yes, I have.

Mr. Hale: I have three letters which I should like to have marked "Plaintiff's Exhibit M, N, and O."

(Letters marked "Plaintiff's Exhibit M," "Plaintiff's Exhibit N," and "Plaintiff's Exhibit O.")

Q. I ask you to examine "Plaintiffs Exhibit M" and state what it is?

A. This is a letter that I wrote to Mr. Champlin on March 26, 1926, addressed to him at the Emerson Hotel, in Baltimore, Maryland.

Mr. Hale: We offer the letter, if Your Honor please. I understand there is no objection.

The Court: Admitted.

Mr. Hale: I will read it:

"March 26, 1926. Mr. H. H. Champlin, Emerson Hotel, Baltimore, Maryland. Dear Mr. Champlin: At the suggestion of Mr. P. C. Keith, of the Cross Engineering Company I enclose herewith a copy of the file history of the Gray Patent No. 1,340,889, dated May 25, 1920. I enclose also a copy of a German Patent to Richard Baynes, John Fearenside and William Phillips Thompson, No. 30,610, with a drawing attached, which shows the use of an adsorption material such as Fuller's Earth for treating hydrocarbon vapors back as early as 1855. There is also a British patent to Thompson, No. 6,786 of 1884, which discloses the same principle of treating vapors with an adsorptive material. I am endeavoring to get a photostatic print made of this patent today, and if it is not received, I will forward it in tomorrow's mail. I trust that this will give you the information which you wish. Yours very truly."

[fol. 562] Q. And the original was signed by you, Mr. Schofield?

A. It was.

Q. In like manner I ask you to identify "Plaintiff's Exhibits N and O"?

A. "Plaintiff's Exhibit N" is a letter which I wrote to Mr. Champlin addressed to the Champlin Oil Refining Company at Enid, Oklahoma, June 25, 1926.

Q. And "Plaintiff's O"?

A. "Plaintiff's Exhibit O" is a letter which I wrote to Mr. Champlin, the Champlin Refining Company, Enid, Oklahoma, July 7, 1926.

Mr. Hale: We offer both these exhibits, if Your Honor please. I understand there is no objection.

The Court: Admitted.

Mr. Hale: I will read "Plaintiff's Exhibit N":

"June 25, 1926. Mr. H. H. Champlin, Champlin Oil Refining Company, Enid, Oklahoma. Dear Mr. Champlin: I am enclosing herewith a copy of the German patent to Baynes, Fearenside and Thompson, No. 30,610 of 1855, and the British patent to Thompson, No. 6786/1884. At the present time we do not have an extra copy of the file history of the patent to Thomas T. Gray, No. 1,340,889 dated May 25, 1920. However, a copy will be available within a few days, and we will be very glad to send it to you. Will you kindly acknowledge receipt of these. Very truly yours."

Q. Was the original signed by you?

A. The original was signed by me.

Mr. Hale: I read "Plaintiff's Exhibit O":

"July 7, 1926. H. H. Champlin, Esq., Champlin Refining Company, Enid, Oklahoma. Dear Mr. Champlin: Supplementing my letter of June the 25th, I am enclosing herewith a copy of the file history and references of the patent to Thomas T. Gray, No. 1,340,889 dated May 25, 1920, which will complete your duplicated file on the treating process. After you have completed the perusal of this, will you kindly return it to me? Very truly yours."

[fol. 563] Q. The original was signed by you?

A. Yes, sir. All of those letters were either signed by me or by my secretary. They were sent from my office; that is my signature, initials on there, and I am not positive whether I personally signed them.

Q. But in any event they were sent with your knowledge and by your direction?

A. That is right.

Cross-examination.

By Mr. Glasser:

X Q. Mr. Schofield, when was the first time that you ever registered at the Oxford Hotel in Enid?

A. Well, I don't know that I was ever registered at the Oxford Hotel. I don't recall of ever registering at the Oxford Hotel. You see, I was only in Enid one day; and while we were in and out of the hotel, I think that the room which Mr. Keith got he registered for. I don't recall ever having registered there. I may have done so.

Q. You were never in Enid, I take it from your testimony, upon more than one occasion?

A. That is the only time I have ever been in Enid.

Q. And Mr. Keith was with you upon that occasion?

A. Yes; Mr. Keith was with me.

Q. Is there any other T. C. Schofield in Kansas City, Missouri, that you know of?

A. My initials are not T. C.

Q. What are the initials?

A. T. E.

Q. Is there any other T. E. Schofield in Kansas City?

A. I don't believe there is a T. E. Schofield. There may be a T. C.; I don't know. There are some other Schofields in Kansas City; I know that.

Q. Do your records show that you left for Washington on the night of February first, or New York?

A. The records show that I was on a trip to New York and Washington from February first to February ninth inclusive; so that I probably started—The last record that I have that I was at home was January the thirtieth, and I spent that day in Chicago.

Q. What day in Chicago?

A. January the thirtieth.

[fol. 564] Q. What place were you in Chicago on that day?

A. My records show that I spent a part of the time in Chicago, which was evidently between trains, with my foreign associate there. I file my foreign patents through an associate in Chicago, and I make it a point to go and see him usually when I pass through Chicago, and I did on this occasion.

Q. Is it your recollection that you started for New York or Washington from Kansas City on that trip?

A. Well, I was evidently in Kansas City on January the 29th, because I have a charge which was in Kansas City.

Q. Was the trip to New York and Washington anything to do with the Champlin matter and the Fearnside patent?

A. No. It had nothing to do with the Champlin matter at all. It was concerning some interference matters in which Gasoline Products was involved at that time.

Q. Did you on that trip to Washington make any investigation or procure any records having to do with the Thomas Gray patent?

A. I made no investigations at all while I was in Washington on this trip, in the matter, at all.

Q. When did you first commence your investigations on the Gray patent?

A. Well, I never have made any exhaustive investigation of the Gray patent.

Q. Well, I didn't use the word "exhaustive"?

A. Well, what investigation I have made has been due to the investigation that would come normally in the prosecution of patents of a similar kind.

Q. Well, you came to Enid, on whatever date you made that visit, for the purpose of advising Mr. Champlin as to the Gray patent, did you not?

A. Yes.

Q. And you had made several—You had made sufficient investigation to feel that you were able to advise him on the matter?

A. When I went to Enid I felt I had sufficient information to show Mr. Champlin that the Gray patent was not as broad as it had evidently been represented to him.

[fol. 565] Q. Well, your real purpose in coming to Enid was to convince Mr. Champlin that the German process or the German plan of vapor phase treating could be used in conjunction with Dr. Cross's copperized clay and not infringe the Gray process?

A. No. I wouldn't say that was my purpose. I had no idea when I went to Enid to have Mr. Champlin use that German process at all.

Q. What was your idea he should use?

A. I merely showed him the German patents and the British patent, to endeavor to give him an idea of the scope of the Gray patent.

Q. How was he concerned with the scope of the Gray patent?

A. I understood from Mr. Keith that he was.

Q. Well, Mr. Keith was right there at that conversation at that time, wasn't he?

A. Yes.

Q. He heard that conversation?

A. Yes.

Q. Had some part in it?

A. Yes.

Q. What was said at the conference? Or, rather, what was the subject of the conference?

A. The subject of the conference was this. We were endeavoring to show Mr. Champlin the scope—the state of the art—and to try to bring out to him just how the Gray patent was limited by this prior patent. That is what we were trying to show Mr. Champlin, as I recall it.

Q. Now, did you at any time make any representation to Mr. Champlin in which you simply said that the Gray patent was merely limited?

A. That is my recollection, and I think it is borne out by correspondence that I have.

Q. By these letters that have been offered in evidence?

A. No.

Q. What correspondence do you refer to, then?

A. Well, after we had talked to Mr. Champlin I wrote a letter or sent a wire to Mr. Welling in New York, and advised him of this meeting with Mr. Champlin?

Q. Yes.

A. And at that time I told him—that is, I wired him—

that I thought we had convinced him that the Gray patent wasn't as broad as it had been represented.

[fol. 566] Q. Was that the correspondence you say you think limited the——

A. That is the correspondence.

Q. Yes. Well, that was subsequent to your conversation with Mr. Champlin?

A. Exactly. Yes, sir.

Q. Did Mr. Champlin know anything about that letter you sent Mr. Welling?

A. No. I didn't send a copy to Mr. Champlin.

Q. Then how could Mr. Champlin know anything about that limiting the Gray patent——

A. (Interrupting): I didn't refer to that letter to bring out that Mr. Champlin knew anything about that correspondence. It was merely to show what our conversation was at that time, between Mr. Champlin and myself.

Q. What were you writing Mr. Welling about it for?

A. Just reporting to him that I had seen Mr. Champlin.

Q. Well, was that on account of your employment?

A. Exactly. Yes, sir.

Q. Then you were employed by the Gasoline Products Company?

A. Both by the Gasoline Products Company and the Cross Development Company.

Q. Well, whom were you representing at Enid when you were talking with Mr. Champlin?

A. My charge was against the Gasoline Products Company.

Q. They paid the charge?

A. Yes.

Q. Now, you learned down there from Mr. Champlin—or you learned that Mr. Champlin had a sick son that was going to Baltimore, Maryland, to the Johns Hopkins Medical School, didn't you?

A. I don't recall that I did. I may have heard of it. But I do recall that Mr. Champlin came into the hotel with a son, or a relative, and he was in that room at the time we were there.

Q. You sent some papers to Baltimore, at the Emerson Hotel? To him.

A. Yes.

Q. Why was it so urgent that you found it necessary to send the papers to Baltimore?

A. It wasn't, so far as I was concerned. I was advised by Mr. Keith to send them. I wasn't anxious to send these [fol. 567] to Mr. Champlin; I was acting on their request at the time.

Q. On whose request?

A. Why, Keith's.

Q. Then it was Keith who directed you to forward these papers to Mr. Champlin at Baltimore at the Emerson Hotel?

A. Yes.

Q. And you did it?

A. Yes, sir.

Q. Do you remember what it was you forwarded to the Baltimore address?

A. Yes. I sent the file wrapper of the Gray patent.

Q. I will hand you this exhibit, not to be marked, and ask you to state what that is? Not for the purpose of introducing it in evidence. State what that is, please.

A. This is the certified file wrapper of the Gray patent number 1,340,889.

The Court: Certified copy, isn't it?

The Witness: Certified copy. Yes, sir.

The Court: A duplicate of the one you forwarded to Mr. Champlin, except for the certification?

A. Yes, sir. I don't recall whether I sent a certified copy. But that is what I sent him.

Q. Then this exhibit——

A. (Interrupting): Let me see that drawing, will you please? (Examines drawing.) Yes. That is the patent.

Q. That is the completed file wrapper of the case?

A. Yes.

Q. And whether it was a certified copy or otherwise, you forwarded Mr. Champlin a copy of the file?

A. Yes. I didn't send him the file wrapper. I think I sent him a file history, but substantially the same subject matter that was in it.

Q. But the one you sent him wasn't certified by the Patent Office, was it?

A. I don't believe it was.

Q. What was your purpose of furnishing Mr. Champlin with a file wrapper on the Thomas Gray patent?

A. I wanted Mr. Champlin to look that over and acquaint himself with the prosecution of the patent through the Patent Office.

[fol. 568] Q. This file wrapper disclosed that Gray had considerable difficulty in getting his patent, does it not?

A. As I recall it, I think he did.

Q. Well, examine it and be sure about it. Give us the date of the application and the date of final allowance, and such other facts in that connection as you may note?

A. The case was filed on May 18, 1914. And it was issued into a patent on May 25, 1920.

Q. Something over a period of six years later?

A. What?

Q. Something more than six years later?

A. Yes.

Q. Did you call Mr. Champlin's attention to that fact?

A. While I was at Enid I wouldn't say positively whether I had a copy of the file history—I think I did—but if I did I would have called his attention to the fact that it took six years to put it through the Patent Office, although that isn't anything unusual for a patent, nowadays.

Q. Did you note the fact that the chief examiner had been changed, in the course of the rejection and final allowance of the patent?

A. I don't recall that I called it to his attention. I think the examiner was changed, however.

Q. Examine the papers and see? (Witness looks through papers.)

A. I wouldn't attach any particular importance to that.

Q. I am asking you if that is the fact?

A. Well, Eli evidently was the first examiner, and it was—Yes. The examiner was changed.

Q. When? Give the date when, please?

A. Eli was examiner up to the action of January 31, 1919. And then what appears to be Grindel.

Q. Did you call Mr. Champlin's attention to that fact?

A. I don't recall that I did.

Q. Was there any talk in that conversation about that being a political patent?

The Court: Being a what?

Q. Political patent?
A. No, I don't recall.
[fol. 569] Q. You had no recollection?
A. No. I don't know what that is.

The Court: What is a political patent?
Mr. Glasser: I don't know. I am just trying to find out about the expression.

Q. Was there any discussion of political patent at that time?
A. Not by me.
Q. Well, in your presence?
A. No. Not that I recall.
Q. Now, after you furnished this file to Mr. Champlin, and the three letters—and had written three letters, copies of which have been introduced in evidence here—you had no further connection with the matter, did you?
A. No further connection, other than the papers which were sent which have been referred to in these letters.
Q. You—Were you ever present in Dr. Cross's office when the matter of the Gray patent, as bearing upon the so-called Cross vapor phase treating tower, was the subject of conversation?
A. No. I don't recall being present at any meeting of that sort.
Q. Did you have any personal knowledge of the so-called Cross vapor phase treating system?
A. The only knowledge I have had of any of these Cross Developments matters have been merely my connection with the prosecution of the patents.
Q. You filed the application for the patent on the so-called copper strip, did you not?
A. Yes, and I prosecuted the patent and it was issued.
Q. Now that patent, as I understand it, merely allowed the combination of copper and clay for the purpose of avoiding the so-called chlorination treatment in towers?
A. Well, the claim merely recited the product itself. Had no reference to anything else.
Q. Now, just how was your claim made, with reference to the process with which it was to be used?

A. Perhaps I can best reply to that question by reading one of the claims if you want me to do so.

[fol. 570] Q. All right. Do so. So that the jury may understand how you proceeded?

(Witness takes paper from case.)

A. I will read from a patent to Roy Cross, Number 1,515,733, issued November eighteenth, 1924. The title of the patent is "Refining Material." I will read the first claim, as that is typical. (Reading:) "A refining material for treating petroleum hydrocarbons consisting in a highly absorbent inorganic material co-bin-d with a metal salt. The latter having an affinity for sulphur compounds of the hydrocarbons."

X Q. Now, Mr. Schofield, in order that that claim may be utilized and the patent made available it was necessary that a process, either the Gray process or one similar, would by necessity be utilized to bring about the operation of your patent, would it not?

A. Well, I would say that to use that material you—perhaps I could better answer the question by saying that a process which infringed that claim would be one in which a material of that character was used. I don't know whether I get what you are driving at?

X Q. I will ask the question in another form. Was it possible to use the Dr. Cross patent that you have now just referred to unless you used the Gray process or similar process in conjunction therewith?

A. You would have to use a——

Q. Won't you answer that yes or no and then explain it?

A. Yes. You would have to use a process in which this material described in the claims of the Cross patent was incorporated in the process so that hydrocarbon vapors could be passed through the material into the vapor phase.

X Q. In other words, that patent from which you are reading is nothing more nor less than an improvement on Gray's patent, if Gray's patent was valid?

A. That would be an improvement upon any, yes.

X Q. Assuming that Gray's patent was valid?

A. Yes.

X Q. Am I correct in that statement? Now then if Gray's patent was invalid then the entire system would be available to Dr. Cross on his patent, and would be a completed

[fol. 571] process that he would have entirely covered in the use of copper, would it not?

A. We will have to make the assumption that the Gray patent is valid until some Court has——

X Q. I am not asking you to indulge in that assumption. I am just asking you now about what would have been the fact if Gray's patent had not been invalid—or if it had been invalid, I mean to say?

The Court: I think you are assuming in that patent some claim of a process in addition to the product; is that the fact?

Mr. Glasser: That is my theory, that this is an improvement on the process.

Witness: That isn't the fact.

The Court: That isn't the fact, as I understand.

Mr. Glasser: I understand that this patent—this product patent cannot be used except with Gray's process patent.

The Court: Nothing said about it in the patent.

X Q. I am asking him if that isn't the fact?

A. That isn't the fact.

By the Court:

Q. There has to be some process. Is this true: Of course to be useful and valuable it has to be used with some process?

A. Exactly.

By the Court:

Q. But not necessarily the Gray process?

A. Not the Gray process.

X Q. That clarifies it. Now what other process was available if you didn't use Gray's?

A. Well, you could go through the prior art and use almost any process that you could use it in.

X Q. Let's go through and choose one.

A. Well, I should select for instance your German patent which has been in here.

X Q. What was the distinction or difference between the so-called German patent and the Gray patent?

A. Well, perhaps I can best bring that out by reading one of the Gray claims.

X Q. Let's take the Gray claims and the German patent claims. I want the translation. I have what has been agreed to be the English translation of the German patent [fol. 572] and I will ask you to take the claims of the two patents and indicate to the jury wherein the claims are different?

A. You understand that there are nine claims in this Gray patent. All of these claims are different in—are different to a certain extent. That is, they have an added element or have omitted an element. In the same way the German patent has two claims, one a process claim and one an apparatus claim. All of the Gray claims are method or process claims. Now a comparison of the two is rather difficult for this reason: That the claims in the United States are drawn very differently than the claims are drawn in foreign countries. The German claims, while somewhat more limited than are required by Great Britain or perhaps France, are usually not as limited or as detailed as the U. S. claims, so that as the usual thing you can say that these foreign patents are used primarily as publications, and we do not usually compare the claims with one another only to bring out the differentiation between the processes.

X Q. I will ask you this question: If the claim in the German patent is basically a proper claim and is allowed as a German patent in 1854 or 1884, whatever the year, whether that sufficiently establishes the proper state of the art to defeat the American claims no matter how complicated or how lengthy they might have been written?

A. I should say that—that if a German claim or a German patent has a claim which describes an identical process to that which is issued as a patent in the United States, that the German patent would constitute an anticipation.

X Q. I will ask you if that is not the fact in the instant case?

A. Well, I would like to read the claim in one of the German patents.

X Q. Very well. Then I would like to have you answer my question after you do it.

A. (Reading:) Bleaching and purification of oil by passing the oil vapors through freshly heated porous substances such as wood charcoal, powdered coke, bone black, pumice

stone earth, clay, iron oxyhydrate powdered chalk and other adsorptive material with or without the introduction of [fol. 573] superheated steam at atmospheric pressure or below in order to remove coloring material and other admixtures from the vapors. Now the claim in the Gray patent reads—

X Q. Now, Mr. Schofield, are you reading the claim in the Gray patent opposite that claim?

A. Yes. That is what I understood. I guess I will choose any claim, say claim 8. The method of deodorizing and clarifying liquid hydrocarbon mixtures which comprise vaporizing a liquid and passing the vapor through Fuller's Earth maintained at a temperature not materially below the boiling point of the least. Volatile fraction of the distillate required. Now the Gray process, that claim of the Gray process, could perhaps be differentiated from the claim of the German patent by the fact that there is a requirement in Gray that the vapors be maintained not materially below the boiling point of the least volatile fraction of the distillate required. That is the differentiation between the two processes.

X Q. Now I will ask you the pointed question if in your opinion——

A. Also Fuller's Earth.

X Q. Pardon me.

A. Also Fuller's Earth is specially mentioned there, while the German patent suggests clay, if that could be considered a differentiation.

By the Court:

Q. I thought Fuller's Earth was a species of Clay?

A. It is a species of clay, but the Gray patent is more specific in that regard, as Fuller's Earth has a little different effect upon hydrocarbon vapors, than some of the clay.

X Q. Now, Mr. Schofield, isn't it a fact that the two claims that you have just read side by side are merely the same thing couched or in a little more technical language than the other?

A. No, I think that added element in the Gray patent of maintaining at a temperature not materially below the boiling point of the least volatile fraction would be a differen-

tiation. It means that it maintains oil in a vapor phase while that limitation is not in the German patent.

[fol. 574] X Q. Now did you on the night that you talked with Mr. Champlin explain to him as you are now explaining it to the jury?

A. We went through these patents very much in the same manner.

X Q. Did you point out to Mr. Champlin upon that occasion the distinction that you now seek to point out to the jury between those two claims?

A. I don't recall that I made that distinction.

X Q. Isn't it a fact that you put the two claims side by side and argued and explained to Mr. Champlin that there wasn't anything in the Gray patent?

A. No, I didn't say that.

X Q. Well, what do you say about that?

A. I said that the Gray patent was limited in its scope by these prior art references, and that is my opinion to-day.

X Q. True enough, and didn't you tell Mr. Champlin that he could safely in your opinion follow that German patent and put copper in the clay and have a so-called Cross vapor phase treating system and not infringe Mr. Gray's patent?

A. I don't recall that I said that. I told Mr. Champlin that if he used the Cross material in an apparatus such as described in the German patent that he would not—that he would be safe.

X Q. That is it.

A. But I didn't mean to give him the impression that he might not be sued by Gray.

X Q. I understand. Do you understand what the least volatile fraction refers to in Mr. Gray's claim, in the claim that you have just read?

A. My understanding about the claims of that patent—just to give it generally—is that the material is all in the vapor phase.

X Q. What I am getting at, I want to ask you the question and I want to see if you understand my question before I ask it. Do you understand what is meant by the least volatile fraction?

A. Well, I would suppose it would be the fraction that has the highest boiling point.

X Q. All right, we seem to understand it. Now with a 437 end point which I understand to be the least volatile frac-

[fol. 575] tion of gasoline from a Cross unit be passed through a Gray tower such as described in that process patent, the vapor temperature entering the tower would be about what, in your opinion, if you know?

A. I don't know.

X Q. Assuming it would be 365 Fahrenheit, would you say that 365 Fahrenheit was not materially below the boiling point of the 437 end point boiling material in gasoline, end point boiling material?

Mr. Hale: If Mr. Schofield can answer that question we would be proud to have him.

The Court: I thought he was a lawyer and not an expert in your patent case.

Mr. Glasser: These lawyers are experts.

The Court: Maybe he is.

A. I wouldn't want to attempt that because I am not a technical man.

The Court: Those would be good questions for Mr. Cross.

Mr. Glasser: We didn't get an opportunity to talk to Cross.

Redirect examination.

By Mr. Hale:

Q. Mr. Schofield, by refreshing your recollection from any notes which you have, can you say where you were on May 18, 1926?

A. From May 18th to May 24th, inclusive, I was in Wilmington, Delaware, in connection with a suit which we had with the American Refining Company. That was in 1926.

Mr. Hale: Now, if Your Honor please, it is stipulated by the parties that January 31, 1926, was a Sunday.

Q. Mr. Schofield, what do you do with reference to your charges, keep a charge book in which you put down the name of the client and the service performed?

A. This is the book that I use, and I make an original and a carbon, and the carbon is perforated, and after——

Q. I don't care about the details. What I am getting at is this: Was your charge against Gasoline Products Com-

[fol. 576] pany for your services on February 12, 1926,

made at the direction of any officer of Gasoline Products Company?

Mr. McKeever: I object to that, if Your Honor please, as not material.

Mr. Glasser: That seems to be an effort, if Your Honor please, to impeach his witness' testimony now.

Mr. Hale: I don't want to impeach it at all. I just want to explain it.

Mr. Glasser: It suggests the answer, is leading, and it is entirely improper.

The Court: He has stated that he charged this to the Gasoline Products Company. I think that is as far in that direction as it is necessary to go.

Mr. McKeever: If Your Honor please, he also testified that they paid the bill.

The Court: Yes, he said they paid it. I don't see the bearing of it anyway, but, however, that is what the testimony was. As to whether they should have paid it is not material to this issue.

Mr. Hale: I shouldn't think so, except that they may try to argue that the fact a lawyer makes a charge to a certain client is itself binding on that client.

The Court: If we come to that, we will cross that bridge when we get to it.

By Mr. Hale:

Q. Mr. Schofield, on February 12, 1926, had you ever seen any designs or drawings of the Cross vapor phase system treating towers?

A. The only thing that I had were the applications I had filed in the Patent Office. I had one or two of those that had drawings, just patent drawings, diagrammatic.

Q. They were not such drawings that you could build a plant from them?

A. No; they weren't working drawings.

The Court: We will take the usual ten-minute recess, Gentlemen.

(Recess.)

[fol. 577] Q. Mr. Schofield, showing you "Plaintiff's Exhibit P," is that a copy of the telegram which you sent to Mr. Welling, about which you testified?

A. That is a copy of the telegram which I sent to Mr. Welling after I had a conference with Mr. Champlin on February 12th. This telegram was sent on February 15, 1926.

Mr. Hale: If Your Honor please, we offer this, and I understand there is no objection, and I will read it to the jury. (Reading:) "February 15, 1926, Kansas City, Missouri. Charles H. Welling, Care Gasoline Products Company, 52 Broadway, N. Y. In company with Keith had a very satisfactory interview with Champlin at Enid on vapor phase treatments last Friday. Believe we succeeded in convincing him that Gray patent was not as broad as he was led to believe. Signed T. E. Schofield."

Mr. Hale: And it is stipulated, if Your Honor please, that in the year 1926 the Friday next preceding February 15th was February 12th.

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P. C. Keith, Jr., a witness for plaintiff, being duly sworn, testified:

Direct examination.

By Mr. Marsh:

The Court: Is this your oral witness?

Mr. Marsh: Yes, Your Honor.

The Court: Have you any more depositions?

Mr. Marsh: No, Your Honor. This will be the end of our case.

By Mr. Marsh:

Q. Will you state where you got your college education?

A. I went to school in Texas, Austin College, and graduated there in 1919, and went to Massachusetts Institute of Technology three years.

Q. Leaving there in what year?

A. 1922.

Q. What was your first commercial or business occupation after you left Boston Tech?

A. In the fall of 1922 I went to work for the Texas Company.

Q. Where did that work take you?

A. Port Arthur, Texas.

[fol. 578] Q. What was the nature of the work that you did with the Texas Company at Port Arthur?

A. I was in the capacity of a research engineer I suppose.

Q. What sort of a plant did they have at Port Arthur? Will you describe that?

A. They had a complete refinery at that time, refining from 66,000 to 70,000 barrels a day of crude, consisting of topping units, steam stills, cracking plants, wax plant, lubricating plant and grease plant.

Q. Did your work there require you to give professional and engineering services in connection with those various plants?

A. Yes, sir.

Q. How long did you stay with the Texas Company?

A. About fifteen months.

Q. What was your next employment after that?

A. The Universal Oil Products Company.

Q. That is the same company that has been referred to as the owner of the Dubbs process, is it not?

A. Yes, sir.

Q. What was the nature of your experience with them?

A. I went with the Universal Oil Products Company as research engineer to do some research in the field on the Dubb cracking process.

Q. That was done in the field largely, was it not?

A. All of it was in the field.

Q. How long did you stay with them?

A. One year.

Q. And what was the next business connection that you had?

A. Mr. L. E. Winkler and myself formed a partnership of Keith and Winkler and set up an office in Wichita, Kansas, to do consulting and constructing engineering.

Q. What year was that?

A. That was in 1925; the Spring of 1925.

Q. And then Mr. Koch became associated with you, I believe the testimony shows?

A. Yes, sir.

Q. That was shortly after that?

A. That was in August or September, I believe.

[fol. 579] Q. And what was the nature of the business of Keith & Winkler and Keith, Winkler & Koch?

A. To do general refinery consultation work and some construction work. We were interested in selling and installing bubble towers at that time.

Q. What terminated your relationship with them? What was the next business association that you entered into?

A. I became associated in December with the Cross Engineering Company.

Q. Now, will you state briefly the nature of those arrangements? They have been referred to in the testimony before, I believe.

A. The Cross Engineering Company was a corporation formed by Dr. Walter Cross and Dr. Roy Cross. The Kellogg Company made a connection with the Cross Engineering Company to represent the Kellogg Company in the Mid-Continent Field,—and by Mid-Continent Field I mean Oklahoma, Kansas, Arkansas and Louisiana,—in an effort to sell construction contracts covering the erection of Cross cracking plants.

Mr. McKeever: If the Court please, I object to this detail of what that arrangement was. That has been testified to and offered in evidence by others. There is no knowledge in this witness of apparently just what that arrangement was.

The Court: Make it concise.

By Mr. Marsh:

Q. What was your work to be in Cross Engineering?

A. I was to be general manager of the Cross Engineering Company.

Q. Were you to be in general charge of their activities?

A. Yes, sir.

Q. Who else was employed at that time? I am referring now to December, 1925;—by Cross Engineering Company? Were there any other employes?

A. Well, of course, if you classed Dr. Walter Cross and Dr. Roy Cross as employes, they were in the company; but over and above that there was a man named Overmier; another fellow named Ryan; another fellow named Fruit——

Q. In connection with this employment of the Engineering Company by the Kellogg Company in the Mid-Continent [fol. 580] Field, will you state when you first came in con-

tact with the Champlin Refining Company and the circumstances of that first meeting, if you will?

A. It was about December the eleventh, I think tenth or eleventh. Mr. Harcourt had been calling on the Champlin Refining Company to sell them a Cross license. He was leaving for the East and I asked him to take me down to Champlin Refining Company and turn over the business to me, and Mr. Harcourt took me down to Enid for the first time, and we saw on that visit Mr. Slater. I don't think we saw Mr. Champlin the first time.

Q. Which Mr. Slater was that?

A. P. E. Slater.

Q. Mr. Harcourt introduced you to Mr. Slater?

A. I had met Mr. Slater previously, I think.

Q. Did you have any detail discussion at that time about this project that Mr. Harcourt had been discussing with the Champlin people?

A. Mr. Harcourt told me what had gone before, and we discussed the advisability of Mr. Slater recommending a Cross process being installed.

Q. Had any decision been arrived at at that time by the Champlin people as to what type of cracking installation they would make?

A. No, sir; I don't think so.

Q. Was any reference made to the investigation that they were making at that time of cracking processes?

A. I don't know if any specific reference was made. I understood Mr. Slater was examining all those processes before he finally made up his mind which he thought would be the one to recommend.

Q. Was there any discussion at this early conference about the manner of treating to be used in the event the Champlin Company did install a cracking process?

A. I am not sure, but I think there was. I know Mr. Harcourt told——

Mr. McKeever: I object.

The Court: I do not think the conversation with Slater can go in in full.

Mr. Marsh: I simply wanted to keep to the topics that were discussed——

[fol. 581] The Court: He had no authority, so far as I know, to bind Mr. Champlin.

Mr. McKeever: Nor what Harcourt told him.

Mr. Marsh: I simply was asking what was discussed at this conference with Mr. Slater

A. The Cross cracking plants, the Gray treating process, and I think the Cross vapor phase treating system.

Q. Was there any reference made to any other method of treating that you can remember?

A. I don't recall.

Q. Did Mr. Slater state to you whether any decision had been arrived at about the matter of treating?

The Court: I think I shall have to exclude that.

Mr. McKeever: While I am on my feet may I make an observation. I want to be liberal, but Mr. Marsh is putting the answers to these questions in the mouth of the witness. This is an important witness——

The Court: When you get to the important point be sure to avoid leading.

Mr. Marsh: Yes, I am trying to follow the Court's instructions to get through with the preliminary period.

The Court: Also be sure that the jury hear every question. I don't think they heard all this.

By Mr. Marsh:

Q. When did you next go to Enid, as you remember it?

A. Sometime before Christmas as I remember.

Q. Did you go alone or in company with some other person?

A. I went alone.

Q. Do you remember who you saw at that conference or on that occasion?

A. I think I saw both Mr. Champlin and Mr. Slater.

By the Court:

Q. Mr. P. E. Slater?

A. P. E. Slater. I am referring all the way through to Mr. P. E. Slater. I will say E. J. when I refer to him.

Q. Will you state whether, and if so what, matters were decided at the time of that conference?

[fol. 582] The Court: Which conference?

Mr. Marsh: This is the second conference.

The Court: I don't think you can ask him what was decided. That might be the question in dispute. Ask him what was said, if you want to.

Q. All right. What was said at this conference?

A. I think that is the conference in which I brought back from Kansas City the samples of gasoline, both raw and treated, that the laboratory had turned over to me—had furnished me—together with the letter which has been referred to in testimony here. I am not sure that that was the time, but it was about that time.

Q. You refer to the letter that Dr. Cross—Dr. Roy Cross—had forwarded with the report on his test of different gas oils?

A. Yes, sir.

Q. And will you state, Mr. Keith, what if any conference you had had up to that time with Mr. Welling about these matters?

A. Well, before the contract——

Q. Simply say this: Had you met Mr. Welling before this conference in December?

A. Yes, sir.

Q. And had Mr. Welling given you a detailed explanation about the New York companies which have been referred to in the testimony in this case?

A. No detailed information. No, sir.

Q. What information did you have in December of 1925 as to this Cross vapor phase treating process?

A. Information that there was such a process; in a general way what the process would do; and the further fact that somebody was desirous of obtaining an initial installation to find out whether it was commercial- feasible or not.

Q. Was it known to you who owned at that time or who was selling the process or who had an application for the patent?

A. I don't think so.

Q. Did you know, and if so will you state what your knowledge was, as to the existence at that time of any plans or drawings of the apparatus required for use in the process?

A. I am not sure, but I don't think I ever saw those at that time. Any plans.

[fol. 583] Q. Did you know that there were any, as a matter of fact?

A. I didn't know that, either.

Q. Was there any discussion at these early conferences with reference to the matter of burning clay or recovering the copper that would be required for use in these processes? Not what was said?

Mr. McKeever: If this evidence is brought out here by the conversation, which makes up whatever agreements were made, it will bring that out without the suggestion from this witness.

The Court: You want to know what he and Mr. Welling said about this——

Mr. Marsh: No. I am not referring to Mr. Welling at all. I am referring now to the conferences that were had with Mr. Slater and Mr. Champlin, or both, in February, 1925.

Mr. McKeever: And I object, on the ground that the question is suggestive. It is bound to be suggestive. The rule would be, I take it, to let him state what the conversation was.

The Court: That is certainly very much better, unless he wants to shorten it.

Mr. Marsh: That is what I am trying to do.

Mr. McKeever: Well, I have been as liberal as I could, in all these matters, but now, Judge, I must insist on the rule.

The Court: What was the question?

(Question read by reporter.)

The Court: I don't think that is objectionable. All he has got to do is say yes or no. He may answer that question.

A. Yes. I think so.

Q. Will you state what was said about it?

Mr. McKeever: Before we pass that I want to say the importance of the matter appeals to me so clearly that I want to save my exceptions to the ruling.

The Court: The question was, as I recall it, whether in conference with Mr. Champlin and Slater the matter was discussed.

Mr. McKeever: And he told him what matter he wants him to talk about.

[fol. 584] The Court: Oh, no, he didn't. The question is admitted subject to your exception.

(Exception allowed and noted.)

Q. Do you remember what was said by Mr. Champlin or Mr. Slater or yourself with reference to the subject of clay or copperized clay?

A. I am not sure of the exact conversation except that my understanding was that there was a rotary coil used for burning clay in the lubricating plant at the Champlin Refining Company, and it was suggested that that coil be used to revivify this copperized clay.

Q. What was the next step in these meetings that you had with Mr. Champlin—with the Champlin people?

A. The next time I was at Champlin was December 30, 1925.

Q. What happened on that occasion?

A. I am unable to recall, except that the conversations were general, as I have said before.

Q. What happened next?

A. I came to Kansas City and I had previously invited Mr. Slater to go to Philadelphia to inspect the Point Breeze Refinery of the Atlantic Refining Company. And Mr. Slater wired me that he would accompany me. And to meet him in St. Louis.

Q. Do you remember what date that was?

A. I think I met Mr. Slater in St. Louis on January 6th.

Q. And what did you and Mr. Slater do?

A. We went on to Philadelphia, arriving there on January 7th, I think. We inspected the Cross cracking units at Point Breeze and spent the entire day there, and Mr. Slater went out and made his own inspection of those cracking plants. That night we went to New York.

Q. Do you remember whether in the course of that inspection of the Point Breeze plant you saw, that Mr. Slater saw the method of treating cracked gasoline that was in use there?

A. I don't know.

Q. Do you know, as a matter of fact, and if so will you state, what method of treating was in use at that time in that plant?

[fol. 585] A. I am quite sure that at that time they were using acid treating and re-running.

Q. Well, what happened after you and Mr. Slater left Philadelphia? You have stated you went to New York?

A. The next day Mr. Slater and myself had lunch with Mr. L. H. Harvison at the Hotel Biltmore.

Q. Now what was said by you or by Mr. Harvison, to Mr. Slater, on that occasion?

A. We discussed the Cross process and its merits; I informed Mr. Harvison—somewhere in the conversation the matter came up—that the Champlin Refining Company was being offered the Cross vapor phase treating tower if they would install the Cross cracking plant. Mr. Harvison at that conference pointed out to Mr. Slater that the installation was new—it had never been installed—and it was his opinion that Mr. Champlin would be sued by the Gray Processes Corporation. I had previously, or did at that time, tell Mr. Harvison——

Mr. McKeever: Just a minute. There is some discussion among my associates here—as to the question of the admissibility of the conversation had with Mr. Slater and Mr. Harvison. What is the ruling of the Court on that?

The Court: So far as Mr. Slater was sent out by Mr. Champlin to procure information as he was, all that subject or those subjects,—I think the conversations showing the information given him are admissible.

Mr. McKeever: If I am not mistaken the ruling was in the trial before that such conversations, if they were brought back to Mr. Champlin——

The Court: Well, wouldn't it be equally admissible of the line of investigation that he is talking about, the line of investigation for Mr. Champlin.

Mr. McKeever: It may be true—somewhere in the other trial the record shows—either Mr. Marsh or Mr. Hale raised the question that it had to be brought back to Mr. Champlin—for instance—say—which was substantiated, [fol. 586] requiring us in that trial to show that the conversation was brought to Mr. Champlin's knowledge to make it admissible. Now that is the reason for raising the question at this time.

The Court: I don't remember.

Mr. Marsh: I don't think it will be necessary to press that further. I think Mr. Harvison has indicated what was said during his testimony, and I will simply ask Mr. Keith about what he said and what Mr. Slater said.

Mr. McKeever: I understood Your Honor ruled in the Harvison testimony that it was admissible.

The Court: Of course it is impossible always to take the same view of things, because the setting of different questions and answers is often different when they come up. But it seems to me that where it has developed that this P. E. Slater was sent out as a representative of Mr. Champlin, throughout the country, for the purpose of getting information about this process, the information that these people gave him is admissible.

Mr. McKeever: I understood Your Honor to rule that way when Mr. Harvison was on the stand. That is the reason I didn't make the objection. Are you pursuing this any further, Mr. Marsh?

The Court: Of course the question——

Mr. McKeever: Well, he says he isn't going to question him any further about it.

Mr. Marsh: I wasn't going to ask any more about that. I won't ask him what Harvison said, but as to what he said, I have some——

Mr. McKeever: Well, whatever that conversation was, the Court allows it, and we take an exception.

(Exception allowed and noted.)

The Court: Yes. You can ask him what was said at this conference when Mr. Slater was present in the way of information given to Mr. Slater concerning these processes.

[fol. 587] (Question repeated by reporter.)

Q. Mr. Keith, did you make any statements to Mr. Slater at this conference with reference to the ownership of the Cross vapor phase treating process?

A. At that conference?

Q. Yes?

A. I don't think so. No, sir.

Q. Well, what happened after the completion of the conference at the Biltmore Hotel?

A. I decided that I would find out about this Cross vapor phase treater, so I went down to see Mr. Welling, to get the matter straightened out in my own mind.

Q. Where did you see Mr. Welling?

A. At his office on lower Broadway.

Q. Now, I hand you Plaintiff's Exhibit "L"——

The Court: That is the letter from Welling to him?

Mr. Marsh: Yes. Stating his authority.

Q. Did you receive a letter of that character?

The Court: Well, he received that letter.

Mr. Marsh: Well, this is a copy.

The Court: Well, the original of this.

Q. Did you receive the original of that letter at this conference?

A. Yes, sir.

The Court: Won't you read that again?

Mr. Marsh: Yes, sir.

(Reads Plaintiff's Exhibit "L" to the jury.)

Q. You remember what type of paper that was written on?

A. That was written on a letterhead of the Cross Development Company.

Q. And signed——

A. By Mr. C. H. Welling, vice-president.

Q. Did Mr. Welling make any further statement to you with reference to the matter of the Cross vapor phase treating at that conference?

A. He explained to me at the conference how the installation was to be made and who was to make it and the relation——

Mr. McKeever: Now if the Court please, that would certainly be taking advantage of us for them to walk down [fol. 588] from New York and relate a conversation now between Welling and Keith.

The Court: As a general thing that would not be admissible, but he has received a certain authorization from Mr. Welling's company at that time.

Mr. McKeever: All right. Produce the letter.

The Court: Yes. Of course that letter would exclude any verbal——

Mr. Marsh: The matter is already in evidence so I don't think it is very important to confirm it by Mr. Keith. I simply wanted to show what Mr. Keith's recollection of it was. Mr. Welling has already testified to it on his examination. May I make an offer to prove? I simply want to show what the oral supplement was to these instructions which was referred to the Gasoline Products Company, and this is offered, and I think Mr. Keith is competent to testify to that. He was the man that received it and I want to know then if he conveyed the same information to Mr. Slater.

The Court: Ask him. Do you think Mr. Welling testified to that conversation?

Mr. Marsh: Mr. Welling testified as to the instructions that he gave Mr. Keith.

The Court: It seems to me he did, without objection.

Mr. Marsh: I don't recollect.

Mr. McKeever: If I didn't object, I don't remember whether I did or not, if I didn't object it was on the ground of a former ruling of this Court. The Champlins sent him out and he was the agent and they were bringing the information to him.

The Court: Slater wasn't there, was he?

Mr. Marsh: He wasn't there at that conference.

The Court: He wasn't there, that would be the basis.

Mr. McKeever: My recollection is he testified that Slater was present there and he talked with him about it, Mr. Welling.

Mr. Marsh: No.

Mr. McKeever: Well, all right.

[fol. 589] The Court: I think I will let that in.

Mr. McKeever: All right.

Q. What if any supplemental instructions were given to you by Mr. Welling with reference to this Cross vapor phase treating system?

Mr. McKeever: If the Court please, I hate to get on my feet but if he will ask what the conversations were without telling him what they were I don't make so much trouble, but I am insisting on that rule because every question he asks suggests the answer. I have expressed myself strongly

that this is not a time in my judgment when the matter can be simplified and to depart from that rule.

The Court: He can give in detail any conversations concerning any subject that he mentioned.

A. I went down to see Mr. Welling and I told him as I recall the conversation which had taken place the day before in the Hotel Biltmore. I told him that I didn't quite understand the arrangement of the Cross vapor phase treater and that I wanted to convince Mr. Slater of the sincerity of my offer, and Mr. Welling told me that the Cross Development Company was the company which owned the patents and the patent application, that the Cross Development Company did not have sufficient money to put in this installation, that the Gasoline Products Company were interested in having such an installation made inasmuch as if it were successful it would stimulate the sale of Cross licenses, and that the Gasoline Products Company were willing to advance the money for this initial installation because over and above that that they were not going to ask any royalty for this first installation if it was put in.

Q. When you speak about the royalty——

A. No royalty to the Gasoline Products or Cross Development Company, no royalty would be asked on this initial installation if it were put in in conjunction with a Cross cracking plant. Then as I remember it I asked him for this letter to show Mr. Slater to convince him that the [fol. 590] Cross Development Company were prepared to defend a suit if the Gray Process Corporation brought it, and to offset if I could the effect of Mr. Harvison's conference with Mr. Slater—Mr. Harvison's opinion of the previous day.

Q. Now what occurred after your conference with Mr. Welling while you were still in New York, if anything?

A. Nothing of any importance that I recall.

Q. What happened next?

A. Mr. Slater and myself started back to Enid. We went to Chicago and spent a day in Chicago and then went on to Kansas City.

Q. What happened in the course of that trip?

A. I explained to Mr. Slater this letter and why I had gotten it, and when we got to Kansas City I gave this letter to Mr. P. E. Slater and asked him would he give it to Mr.

Champlin. Mr. Slater was going directly to Enid and I wasn't going there for some few days.

Q. Now what was the first occasion on which you were at Enid that you remember?

A. I don't recall, but shortly thereafter, three, four, five or six days.

Q. Whom did you see on that occasion?

A. I saw Mr. Champlin and saw Mr. Slater also. I always saw both Mr. Champlin and Mr. Slater when I went down there, P. E. Slater.

Q. What occurred at that conference?

A. I went down to find out what my chances were of selling this Cross license and Cross construction contract to Mr. Champlin.

Q. What happened next? Where did you go—excuse me. Where did you go from Enid after that conference?

A. I don't recall.

Q. You remember when you were next there?

A. I was there on January the 27th with Mr. Welling.

Q. How did you happen to do that?

A. Mr. Welling had wired me asking to see me in Kansas City and I wasn't in Kansas City and not going to Kansas City for some time, so I wired Mr. Welling either at Wichita or at Dallas that I should like to meet him at Enid, and I met Mr. Welling at Enid.

[fol. 591] Q. When did you and Mr. Welling first meet and where?

A. I think in——

The Court: At Enid

Q. At Enid, yes.

A. I think in the Hotel Oxford.

Q. You remember what time of day that was?

A. Early in the morning, if I recall.

Q. Then what hapened after that?

A. Mr. Welling and myself went over to see Mr. Champlin at his office. At least I think that is what happened. In any event I am certain that Mr. Champlin took us out to the refinery to his refinery superintendent's office and we had a conference with Mr. P. E. Slater.

Q. Now at this conference who were present?

A. Mr. P. E. Slater, Mr. Champlin, Mr. Welling and myself. There may have been somebody else come in and go out, but those were the four members that were there.

Q. Now will you state without describing the conversation or attempting to say what anybody said, what different subjects were discussed at that conference?

A. Well, the advisability of putting in a Cross process was discussed.

Q. What kind of a Cross process?

A. A Cross cracking process. It isn't improbable it was compared to other competing processes. Mr. Slater mentioned, I believe it is Mr. Slater, that the Kellogg Company wanted too much for their installation of the Cross cracking plant and that Mr. Koch had offered them a plant at either a definite figure less than that or Mr. Koch had told them that he thought he could put it in for considerably less money than the Kellogg Company would put it in for.

Q. That is this Mr. Koch here (indicating)?

A. That is this Mr. Koch, and Mr. Welling explained to Mr. Champlin and Mr. Slater why Mr. Koch could not make this installation, and then the Cross vapor phase treater was discussed, and Mr. Welling told Mr. Slater and Mr. Champlin that they wanted initial installation.

[fol. 592] The Court: All he is asking you now is the different subjects that were discussed; not what was said. Name the different subjects that were discussed.

Mr. Marsh: That will give Mr. McKeever an opportunity to object.

Q. You go on and enumerate the other subjects that were discussed.

A. That is all I think were discussed.

Q. Now taking up the matter of the Cross cracking plant, who did the talking on that?

A. Why, it is probable that I talked in comparing that with the other processes and attempting to point out its merits.

Q. You remember any other processes that were referred to at that conference?

A. I can't specially recall any. All of these conferences we discussed various cracking processes, the Dubbs, Jenkins, Dubbs and Jenkins principally; once or twice the Manley.

Q. You said that you discussed the terms. Was there any discussion with reference to the construction cost? I believe you have already testified?

A. There was a reference made to the construction cost of the contract if placed with the M. W. Kellogg Company.

Q. What contract was that?

A. That is the construction contract.

Q. With reference to what apparatus?

A. The Cross cracking plant.

Q. Now who took part in the discussion about that?

A. I am not sure whether Mr. Slater as I said mentioned the definite figure for Mr. Koch or whether he informed us that Mr. Koch said he could build it for considerably less than that amount of money, but at any event I attempted to point out the advantage of having that process built by the Kellogg Company.

Q. Had you explained at any time to Mr. Slater or to Mr. Champlin the relationship that you had with the Kellogg Company?

[fol. 593] Mr. McKeever: Now if the Court please——

Mr. Marsh: He has a perfect right to testify what was said with Mr. Slater about that.

The Court: It is probably more pleasing to ask him what he said in reference to his authority.

Mr. McKeever: I have no objection to this witness testifying to every bit of conversation on that connection if the——

The Court: I don't see why you don't——

Mr. McKeever: If the counsel will ask the question and let him do it.

Mr. Marsh: I am referring to this conversation, as a matter of fact, I just want to know what if any statement he made after they started up to then or before then.

The Court: You were diagnosing the conversation without asking what it was. It will be a good idea to ask him what he said.

Q. What was said at this conversation or any previous conversation between you and Mr. Champlin or you or Mr. Slater as to the extent of your authority to represent the Kellogg Company?

Mr. McKeever: Now if the Court please, I really desire on my part to simplify this matter.

The Court: I think you eliminate Slater in that question.

Mr. McKeever: No, he said this time or some previous time. That will mix us all up again. Let's get this one time and let him state everything that was said.

The Court: It will be better to identify the various periods of time.

Mr. Marsh: All I want to show is the knowledge the parties had at the time of that conference, whether that knowledge came from one of these earlier conferences or not is not a matter of any importance, simply what knowledge they had when they sat there in that room.

The Court: Identify each conference and the date and the place and who were there.

[fol. 594] Q. Do you remember any statement at any time with Mr. Champlin with regard to the authority you had from the Kellogg Company?

A. I don't recall.

The Court: We had all that trouble for nothing.

Q. Now will you relate the conversation, if any, that occurred with reference to the Cross vapor phase treater? I am speaking now of your conference of January 27 at the office out at the plant.

A. Mr. Welling, or Mr. Welling and myself, rather, went over this Cross vapor phase treater. Mr. Welling told Mr. Champlin and Mr. Slater that they were desirous, the Cross Development Company, of making an initial installation to see whether or not this proposed treating system would function commercially; and both Mr. Welling and myself pointed out that as nearly as we could see it that treating system would function. We pointed out what we thought to be the advantages of treating with that system, namely, that the gasoline would be doctor sweet and pass the copper strip corrosion test, and require no further treatment.

Q. What, if anything, was said as to the cost of the operation of that system?

A. I don't recall anything having been said as to the cost of the operation.

Q. What, if anything, was said as to the type of equipment that would have to be built to use it?

A: At that time I think we proposed using two towers, one to hold the mixture of copper and clay, and the other to hold a mixture of clay and copper.

The Court: What is the difference between a mixture of copper and clay and a mixture of clay and copper?

A. (Continuing:) I was just going to explain, Your Honor. The first tower was to be heavily charged with copper and a small amount of clay. The second tower was to be heavily charged with clay with a small amount of copper.

Q. What was the purpose as you then understood it of arranging the apparatus that way?

A. As I understood it, the copper was apt to wear out, so to speak, much quicker than the clay, and, if it were all mixed together, there was a probability that the clay would have to be taken out before it was completely used [fol. 595] up, whereas by putting in two towers, when the copper was used up, it could be taken out, reburned and put back, and the clay continued.

Q. Will you state whether the information conveyed to Mr. Champlin by Mr. Welling differed in any respect from the information that Mr. Welling gave you in New York?

Mr. McKeever: I object to that.

Mr. Marsh: He has testified what was stated to him in New York.

Mr. McKeever: Let the jury pass on that. Let him state what was said.

The Court: Do not ask for conclusions. It is better to let the jury decide that.

Q. Will you relate any further statements that were made to Mr. Champlin by Mr. Welling, if you remember any, at that conference?

A. I think I have recounted the conversation. Mr. Welling explained to him how the installation was to be made, and why we thought it would function, and what we thought it would do, and what he was to pay for it. In fact, it was royalty free, put in in conjunction with the Cross plant, Cross cracking plant, and the conditions were that this first installation should be put in by the Cross Development Company.

The Court: By what?

A. (Continuing:) The Cross Development Company, and Mr. Champlin wouldn't be asked to pay for that installa-

tion until the success of it had been proven. At that time he was to be asked to pay what the installation had cost, but no more.

Q. What did Mr. Champlin say about all this, do you remember?

A. Mr. Champlin, I don't recall said very much. He doesn't say very much usually.

Q. What did Mr. Slater have to say about it?

A. I don't recall that.

Q. You and Mr. Welling apparently did most of the talking?

A. We probably did, yes, sir.

Q. Well, what happened after that conference out there at the office at the plant on January 27th?

A. I left Enid. I don't know where I went. I know I [fol. 596] left Enid either that day or the next day.

Q. Wait a second, Mr. Keith. Before you left Enid did you see Mr. Champlin or Mr. Slater again? I mean on the occasion of this particular visit. Do you remember?

A. I don't know whether I did or not see Mr. Champlin and Mr. Slater. However, it is probable, because, if I were leaving on a night train, I usually saw Mr. Slater or Mr. Champlin in the evening after supper.

Q. Do you remember when Mr. Welling left Enid on that day?

A. I know he left. When he left I can't say. I know he went to Kansas City, and the inference is he left on the night train, but I don't remember seeing him get on the train.

Q. Do you remember whether any further conference took place relating to these matters that you had discussed in the morning conference?

A. I don't recall any, no, sir.

Q. Now you started to say where you went after this conference, Mr. Keith. You say you don't remember?

A. I don't remember, except that I was there within the next two or three days. I went off somewhere and I came back within the next two or three days.

Q. So that you were in Enid——

A. I was in Enid on February 1st.

Q. Can you state whether you were alone or in company with anyone on that occasion?

A. I think I was alone. I am quite sure I was alone.

Q. Do you remember where you came to Enid from?

A. Well, my expense account shows me coming to Enid from Tulsa, and going from Enid to Ringgold.

Q. Do you remember what occurred and, if so, will you state what occurred on the occasion of this visit on the 29th or 30th of January or 1st of February?

A. Why, Mr. Champlin told me—I remember this incident——

Mr. McKeever: Just a minute. What date is that.

[fol. 597] Mr. Marsh: He said he was there for a day or two, as I remember it. He was there on February 1st. I started him back a day or two.

Q. Did you say definitely, Mr. Keith, whether you were there before the 1st?

A. I said I didn't know. I said I left Enid and came back, and I either came back before—I know on February 1st that I was in Enid.

Q. Will you state what if anything occurred on February 1st in connection with this situation that you have been discussing?

A. Well, to the best of my recollection it was either on that day or the one just preceding. That was the conference at which Mr. Champlin told me that he was ready to go ahead with the Cross proposition. I remember the conversation. Mr. Champlin and myself had been to the refinery, and he took me back to the hotel in his motor, and we were parked on the side of the Oxford Hotel, and he told me that he was ready to go ahead and do business.

Q. Do business as to what?

A. As to signing the Cross license and having the Kellogg Company do the construction work.

Q. Was anything said as to the vapor phase matter?

A. Not that I recall.

Q. What did you do after this conference with Mr. Champlin on February 1st?

A. I wired Mr. Harvison in New York to come out to Enid to assist me in drawing these contracts and closing the job.

Q. Why did you do that, Mr. Keith?

A. That was the first——

Mr. McKeever: If the Court please, I think that is outside.

Mr. Marsh: Mr. Harvison has already testified about it from the other end.

The Court: He asked him why he wanted Mr. Harvison to come out.

Mr. McKeever: I remember Harvison's testimony about that, and it isn't a thing within this witness' knowledge, what Harvison said he came for.

[fol. 598] The Court: He may answer that. Why did you send for Mr. Harvison?

A. This was the first contract or the first job which I had closed or had sold or worked on in the sale of this Cross cracking license and the construction contract of the Kellogg Company, and I thought it would be wise to have Mr. Harvison there to show me as much about it as he could. I had spent no time with Mr. Harvison or with the Kellogg Company previously and I wanted somebody there to assist me in drawing up these contracts.

By Mr. Marsh:

Q. Having sent this wire, what did you do next?

A. I wired Mr. Harvison not to come to Enid.

Q. Why was that?

A. Mr. Champlin—I saw him—either talked to him or saw him, and Mr. Champlin told me he had decided not to put in this Cross plant.

Q. When was that?

A. That was somewhere around this time, either the first of February or the 30th of January or the 29th of January. Within a few days of that time.

Q. When was it with reference to the conference at which he said he would go ahead?

A. That was after the conference at which he said he would go ahead, because I wired Mr. Harvison not to come to Enid.

The Court: Having previously wired him to come?

A. Having previously wired him to come, I then wired him not to come to Enid because Mr. Champlin had changed his mind.

Mr. McKeever: I would like to ask the witness if he has got any record of that wiring that he is telling about. He is assuming to state what is in telegrams.

The Court: I know, but it is simply the incident of his wiring that he has told about—not what he said, except not to come and to come.

Mr. McKeever: Of course, in this particular case the Court's mind doesn't reach as deeply as mine does with reference to the significance of these incidents.

The Court: Do you happen to have those wires?

[fol. 599] A. I think there is one of them here, Your Honor.

The Court: Well, fish it out.

A. I think I can find it.

Mr. Marsh: We haven't got the correspondence here that that is in.

Mr. McKeever: I have no objection to his saying that he wired him not to come, but he keeps relating telegrams in the questions. I will waive a good deal of this, but I am trying to get my Brother Marsh here to ask these questions so that I won't have to object.

The Court: He will get educated up to that by and by.

Mr. McKeever: I really expect to stay with him on it.

The Court: Leave it this way: You wired Mr. Harvison not to come. Did he come or didn't he come?

A. Not that time, no, sir.

The Court: We will make a little progress, anyway. We have got as far as that he wired him to come and he didn't come.

By Mr. Marsh:

Q. What happened after that, Mr. Keith? You say you sent this wire, telling him not to come and he didn't come. Then what happened?

A. Then I saw Mr. Champlin again and Mr. Champlin decided again to go ahead with the purchase of the Cross license and construction of the Cross plant through the M. W. Kellogg Company, and I wired Mr. Harvison again to come out.

Q. What happened then?

A. I went to Dallas. I was in Dallas for some two or three days, one day in any event. In any event, I called Mr. Slater on the telephone; after I had called Mr. Slater

on the telephone I called Mr. Champlin on the telephone, and Mr. Champlin told me to stop Mr. Harvison coming from New York, because it would be necessary for us to reduce our price a hundred thousand dollars before we got this contract.

Q. What did you do when you heard that?

A. Well, I decided—I told Mr. Champlin that I couldn't stop Mr. Harvison. I could have stopped him en route. I decided that the thing to do was to let Mr. Harvison come [fol. 600] on and see the situation himself, since I had wired him once to come and wired him once already not to come, so I did nothing until I saw Mr. Harvison.

Q. When did you see Mr. Harvison?

A. I saw Mr. Harvison on the morning of February 5th.

Q. Where?

A. On the Pullman, on the Frisco Pullman that comes into Tulsa early in the morning. I know I came up from Sherman and got on the train at West Tulsa, going to Enid, and met Mr. Harvison on that Pullman that morning.

Q. What happened when the train from Tulsa got to Enid?

A. Mr. Harvison and myself went over to Mr. Champlin's office to see Mr. Champlin.

Q. Which office was this?

A. This was the office over the bank I think. At least it was the office on that side of the Square which is directly opposite from the hardware store.

Q. This was the mofning of February fifth you said?

A. That was the morning of February fifth.

Q. What happened at that conference?

A. We walked into Mr. Champlin's office and said "How do you do." After we had been there a few moments Mr. Champlin said that we would have to cut our price one hundred thousand dollars or we couldn't get the business.

Q. What happened then?

The Court: Let him give the whole conversation.

A. Mr. Harvison made the remark that he thought the job had been sold, and that he had come down to close it. If it hadn't been sold he had come down under misrepresentations, and that Mr. Keith could sell the job as well as he. He made some remark that he had brought down contracts with him to show Mr. Champlin that the Kellogg

Company were charging him the same amount of money that everybody else would charge him. I know he told Mr. Champlin in a general way what the profit of the Kellogg Company would be and what their net profit had been over some time, and he did this just before this one hundred thousand dollars or just after, because in any event he started toward the door. Mr. Champlin asked him wasn't he going to be allowed to read these other contracts, and [fol. 601] Mr. Harvison said Yes, and came back over and handed Mr. Champlin these contracts, and I remember he handed Mr. Champlin the Marland contract. We sat down and discussed and the conference went on from there.

Q. Go ahead and relate the conversation just as it occurred?

A. I have related what took place in substance; and at that conference, either in the morning or the one later in the afternoon,—I will put it in the morning conference, but I don't know whether it took place in the morning or the afternoon,—I remember this took place. The Cross vapor phase treating system was discussed and Mr. Harvison told Mr. Champlin that he knew Tom Gray; that Tom Gray was rather a rough and ready sort of fellow, and I think he told Mr. Champlin that he used to work for the Kellogg Company; that he was a very primitive individual, and that if Mr. Champlin put in this Cross vapor phase treater that the Gray process was certain to sue. He pointed out to Mr. Champlin that the Cross vapor phase treater was an experimental one and might not work. I think also he pointed out that it was pending in New York that the patents——

Mr. McKeever: Now he says "I think"——

The Court: You can ask him about that on cross examination.

Mr. McKeever: I object to it, if he thought he said it. I insist that he give in substance what he did say.

The Court: The witness will confine himself to what he is willing to state on oath is his recollection,—to the best of your recollection what was said.

A. To the best of my recollection this was said by Mr. Harvison: that there would be a difference in opinion concerning the scope of these Gray patents. The people in New York didn't think the Cross vapor phase treater—I mean that the people in New York did think that the Cross

vapor phase treater would be covered by the Gray patents, while the people in Kansas City didn't. That was essentially the gist of that conversation. We left Mr. Champlin's office and went to the hotel, and Mr. Champlin was to see us after lunch, sometime in the afternoon.

[fol. 602] Q. What happened at the hotel?

A. Mr. Harvison and myself were in the same room, and Mr. Champlin came up. We had a general conversation, and Mr. Champlin only stayed a few minutes. He got up and left and just as he was leaving he told us to go ahead and prepare our contracts.

Q. Did he specify what contracts?

A. I don't think he did, no, sir.

Q. Then what did you and Mr. Harvison do?

A. Mr. Harvison and myself got hold of either one or two stenographers in the Hotel Oxford and had prepared the license agreement,—the principals would be the Gasoline Products Company and Champlin; the guaranty contract in which the principals were the same; the construction contract covering construction by the Kellogg Company; and this letter of February sixth in which I offered to——

The Court: That letter speaks for itself.

By Mr. Marsh:

Q. Can you remember, and, if so, state who prepared the drafts of the different documents?

A. It is my recollection that Mr. Harvison prepared the license agreement. There was consultation on all these three that I am going to mention; that I prepared the guaranty contract, and that Mr. Harvison prepared the construction contract, and I prepared the letter of February the sixth.

Q. What date is this?

A. This is February fifth.

Q. What happened after?

A. When I say I prepared this,—they ran into that night and the next day because we didn't get them finished until the next morning as I recall. I think we saw Mr. Champlin and Mr. Slater that night and again discussed the terms of this contract.

Q. When you say "this contract" what do you mean?

A. I mean the license agreement and the construction contract and the guaranty contract.

Q. Had there been any decision at that time about the terms of payment for the cracking unit?

A. I don't know. I don't recall any; no, sir.

[fol. 603] Q. Had a price been fixed?

A. The price had been fixed and the terms of payment were fixed; but whether at that time there was a discussion of the change in payments I don't recall. I don't think so.

Q. Now, you have gotten up to the morning of February sixth and you had these four papers prepared. What happened then, February sixth?

A. I don't know whether the contracts were delivered to Mr. Champlin in the hotel or whether they were delivered in his office. My recollection says in his office. I delivered the contracts.

Q. What is your recollection as to this letter of February sixth, as between you and Harvison?

A. I showed Mr. Harvison the letter of February sixth.

Q. Is there anything that brings that to your mind?

A. Mr. Harvison had made his remarks about Gray, and that wasn't any of Mr. Harvison's concern——

Mr. McKeever: I move to strike that out because that is merely a conclusion of the witness and a little argument on the side.

The Court: If you desire, that may be stricken out.

A. In any event, Mr. Harvison and myself discussed the possibility or the advisability of Mr. Schofield's coming down to Enid to see Mr. Champlin about the Cross vapor phase patents in conjunction with——

Mr. McKeever: I would like to ask this witness whether he is telling something that was before Champlin. Was Champlin there?

A. I don't know whether he was or not. He may have been or he may not have been.

Mr. McKeever: I object to his telling a conversation between himself and Harvison.

The Court: That may be stricken out.

By Mr. Marsh:

Q. You had these contracts and you have stated that you showed the February sixth letter to Mr. Harvison?

A. Yes, sir; I did.

[fol. 604] Q. And His Honor has ruled that you can't say what Mr. Harvison said about it, so I will not ask you. Did you say who delivered these contracts to Mr. Champlin?

A. My recollection is that I did.

Q. Where did that take place, if you remember?

A. As I said, I think in Mr. Champlin's office over the bank.

Q. At the time that those papers were delivered who was present, if you remember?

A. I think only Mr. Champlin, and I think Mr. Harvison and myself.

Q. Did any conversation occur at the time?

A. Not that I recall.

Q. You don't recall any statements made by Mr. Champlin?

A. My recollection places it the night before that Mr. Champlin said his financing hadn't gone through and since it hadn't gone through why these contracts could not be signed. It could have been at the morning conference.

Q. Were any of these papers signed?

A. No, sir.

Q. None of them were signed by Mr. Champlin you say?

A. No, sir.

Q. Did Mr. Champlin make any statement to you with reference to the treater?

A. Not that I recall; no, sir.

Q. Well, then what happened?

A. I went back to Kansas City and came back to Enid.

Q. Let's dispose of Mr. Harvison before you came back to Enid? What happened to Mr. Harvison?

A. Mr. Harvison took the noon train back to St. Louis, I think, and I went on to Kansas City.

Q. What happened then with reference to this matter?

A. I got in touch with Mr. Schofield and asked Mr. Schofield to come down to Enid; that Mr. Tom Gray had been there and that Mr. Champlin had talked to me about the conversations that he had had with Mr. Gray, and that Mr. Champlin was fearful that if he put in this Cross vapor phase treater that the Gray Processes Corporation would [fol. 605] sue him, and the proposal of February the sixth only covered the defensive patent suits and not immunity from damages from other——

Mr. McKeever: If the Court pleases, I am trying to be liberal, but this is all something he says he told Schofield.

The Court: But you will probably ask him all about that?

Mr. McKeever: I want the opportunity to do it in a legal way if I do.

The Court: He asked him in a legal way.

Mr. McKeever: But he is detailing conversation he had with Schofield.

The Court: You do not want to know why Schofield came down there?

Mr. McKeever: I don't want this witness to sit there and detail conversation. I don't know what he is going to put in. He can tell any kind of a conversation that happened if he wants to make an argument to the jury, and that is what I am trying to get away from—what I am guarding against—is to have the witness undertake to make what I consider merely an argument.

The Court: Do you or do you not object to the conversation between him and Mr. Schofield whereby the reason of Mr. Schofield coming——

Mr. McKeever: No; if he came there to convince Champlin.

The Court: That is all he said so far, that I remember; giving the reasons he advanced Mr. Schofield why he should come down to Enid. Do you object to that?

Mr. McKeever: I don't object if he will just say the reason he came down and then after he got there define what he did.

The Court: Give what you told him in regard to coming down there?

The Witness: I wired him, Your Honor.

The Court: Haven't you got the wire?

Mr. McKeever: I thought the way he was talking he was having a long conversation with him.

[fol. 606] The Witness: I was trying to repeat the wire.

Mr. McKeever: Was all that in it? I insist now on getting that wire. We are interested in it.

The Court: Of course we should have it. Perhaps Mr. Schofield has it.

Mr. Marsh: I ask to have this marked "Plaintiff's Exhibit Q."

(Copy of telegram marked "Plaintiff's Exhibit Q.")

By Mr. Marsh:

Q. I show you that, Mr. Keith, and ask you if that is a copy of the wire you sent Mr. Schofield?

A. That is a wire I sent Mr. Schofield.

Mr. Marsh: I will read it: This is dated K. C. (meaning Kansas City) February 8, 1926. "Mr. T. E. Schofield, c/o Gasoline Products Co., 52 Broadway, New York City, New York. Harvison myself in Enid on Friday and Saturday meet Tom Gray stop Gray doing everything his power sell Champlin his process and is trying to convince Champlin installation Cross process would be very expensive since Gray would sue and has about convinced Champlin his suit would be won stop Harvison suggests that since Champlin negotiations almost closed if you have no objection it would help matters for you to come Enid and explain in detail to them patent situation stop From indications now it looks like this job should be closed pending your arrival on Wednesday or Thursday stop Please wire me your reaction. P. C. Keith, Jr."

Q. That is a wire you sent Mr. Keith?

A. Yes, sir.

Mr. Marsh: I offer that in evidence.

(Plaintiff's Exhibit Q admitted in evidence.)

Q. I hand you paper marked "Plaintiff's Exhibit R" and ask you if you recognize that as a wire that you received from Mr. Schofield?

A. Yes, sir.

Mr. Marsh: I offer that in evidence.

Mr. McKeever: No objection.

[fol. 607] The Court: I admit that in evidence.

(Mr. Marsh read exhibit "Plaintiff's R" to the jury.)

Q. Well, now, Mr. Keith, did you and Mr. Schofield go to Enid?

A. Yes. It is my recollection that we went down to Enid together.

Q. Do you recall the date on which you went there?

A. I know it was on Friday—I know it was on February 12th.

Mr. Marsh: Can we stipulate that that is the date?

Mr. McKeever: Yes. Friday, February 12th. That is, I stipulate that Friday was February 12th, or vice versa. I don't stipulate that they were there that day?

Mr. Marsh: No, I appreciate that, of course.

Q. Now, Mr. Keith, what happened on February 12th in Enid, so far as you know?

A. Well, Mr. Schofield and myself got into Enid I think about eleven o'clock in the morning, or we got there late in the morning—yes—we got there in the morning, I know. We first went out to the refineries some time that day and saw Mr. P. E. Slater.

Q. Then what happened?

A. We came back to the hotel and that evening we saw Mr. Champlin and I think Mr. Cotton was with him.

Q. Who was Mr. Cotton, if you know?

A. As I understand it, he was Mr. Champlin's son-in-law.

Q. Well, how long did that conference last?

A. I am not sure, I don't think it lasted more than an hour or an hour and a half. We left on the night train to go back to Kansas City, which I think leaves at nine o'clock or a little after.

Q. Well, what happened next, after February 12th?

A. I saw Mr. Champlin in Tulsa on February 22nd. I didn't—I say I saw him on the 22nd. I saw him the next Friday. I wrote a letter about it on February 22nd.

Q. Well, what happened on February 22nd. What did you say to him and what did he say to you?

A. I asked Mr. Champlin how the prospects looked for the sale of the Cross plant. He told me if he had any kind of a cracking plant in, the prospects looked very good. His [fol. 608] financing hadn't been completed, and he didn't know whether he was going to put in any cracking plant or not.

Q. What, if anything, was said about the treating plant?

A. Nothing. I just saw him in the lobby of the Hotel Mayo an instant.

Q. What happened next in the course of this matter?

A. I got in touch with Mr. Champlin over the telephone, or he got in touch with me over the telephone. In any event, over the telephone Mr. Champlin told me to come down to

Enid—that his financing he thought had been arranged for, and we could go ahead with this Cross cracking plant.

Q. Well, did you accommodate him in that respect? Did you go to Enid?

A. Yes. I think I got to Enid on the 25th.

Q. Well, what happened after you got to Enid?

A. Mr. Champlin and myself had a long discussion over the guarantee contract, over the construction contract and over the license contract. We discussed over the guarantee contract whether or not the test run would be made for six days, and Mr. Champlin wanted to extend over thirty days.

Q. Well, how was that matter adjusted? Do you remember?

A. Mr. Champlin was to run the unit. We, by the way, had another discussion of that guarantee contract—whether or not the test run should be made under our supervision or under the supervision of Mr. Champlin. The original contract had been written that they should make this test run exactly in accordance with the written instructions of the contractor. Mr. Champlin objected to that and said he didn't know what those written instructions would be and we finally changed this contract so that the test run would be made by Champlin. He first wanted us to make it, and I pointed out to him that we didn't have any control over the supply of oil or the steam or the water and it was settled that Mr. Champlin should make it under our supervision.

Q. Now, is that change embodied in the draft of the contract?

A. Yes. These contracts were re-written at that time. [fol. 609] Q. What other matters were discussed between you in connection with the matter?

A. Mr. Champlin was quite worried as to whether or not the license agreement was the same license agreement that all of the Cross licensees had obtained. He told me that Mr. Marner of the Jenkins Company had told him that there was a great number of different kinds of royalties in existence, and he wanted to be sure that he was getting this as well as he could get it. We discussed ways and means to safeguard that, and a clause embodying in substance that if any other lower royalty rate should be given a licensee that Mr. Champlin would be given the benefit of that rate, and that was put in that guarantee contract, as I recall it.

Q. You speak of the guarantee contract as the draft that had been prepared by Harvison and yourself?

A. Well, I mean from that one we wrote the others. In addition to that we had to change the construction contract which we had drafted, so that Mr. Champlin could arrange long-time payments. He was to pay over a period of ten months or a year, I have forgotten which.

Q. That construction contract—you say that was a variation or change from the earlier draft?

A. Yes, sir.

Q. Was that contract re-written?

A. Yes, sir.

Q. Well, now, let's see. You haven't referred to the license contract?

A. Well, there is one clause in the license contract that I now remember Mr. Champlin objecting to because I can remember his argument. I recall Mr. Champlin stating—The original license contract stated that if any suits were instituted by someone else for the infringement of patents that Mr. Champlin would give notice of those suits to the Gasoline Products Company and would allow them to control the defense thereof. Champlin pointed out and said, I remember: "Suppose nobody sues me until these patents have only got another year to run. Then if I allowed the Gasoline Products Company to have the defense of this suit they may not defend it strongly enough and I get stuck a lot of money from infringing someone's else patent." [fol. 610] And he wanted to arrange that the Champlin Company and the Gasoline Products Company would handle the suit jointly. Mr. Champlin at that time, on that date,—Mr. Champlin had made arrangements, he told me, to leave town at twelve-fifteen, and these contracts—some of them—were re-written at the Oxford. Part of them at the hotel and part of the re-writing was done in Mr. Champlin's office. I remember we had several stenographers. I remember that Mr. Champlin took those contracts to go with them to a lawyer to have him look them over that morning before we signed. I remember one instance, for example, Mr. Champlin referring—well, it said the Champlin Refining Company was called a corporation of Delaware. I know Mr. Champlin said it would do to strike out the word Delaware with a pen and write Maine in there in ink; it would be satisfactory.

Q. At that—Was the license contract re-written? The previous draft of the license contract re-written?

A. That is my recollection, because we wanted to change that contract to make allowance for this different method of defense of patent suits.

Q. Well, what happened at the office? As I understand it, you now have gone over to the office of Mr. Champlin?

A. Well, I can differentiate. It was at the hotel and at the office. Some was done at the hotel and some at the office. I would write and talk it over with Mr. Champlin, and we didn't get this decided, perhaps, and maybe it would be written over—re-written. I think there was a change—that change in the defense of a patent suit—I think that change was occasioned by Mr. Champlin's visit to his lawyer's office. That is my recollection, at least. That he came back—I know it was. I remember it, for it was something new to me.

Q. Now, what was done if anything about that treating plant at that conference?

A. Nothing. Mr. Champlin told me he had got to catch that 12.15 train to Tulsa, and he told me that he also had a tentative appointment there with Gray to discuss that matter with him. That treating matter.

[fol. 611] Q. What happened after these drafts had been corrected and re-written, as you have related. That morning, before Champlin took that morning train?

A. I left Enid that afternoon.

Q. Well, what was done with these drafts?

A. The drafts?

Q. Yes, this is on the 26th that I am referring now?

A. Yes.

Q. What was done with these re-written drafts of the three contracts?

A. I took those to Kansas City, by way of Ponca City, and mailed them, the next day or two, in to the New York Office of the M. W. Kellogg Company.

Q. Was any signature affixed to those papers? I think you have omitted that step.

A. Yes. Mr. Champlin signed the construction contract, and the license agreement and the guarantee agreement.

Q. What did they relate to?

A. One of the contracts was a contract with the Kellogg Company, referring to the construction of the Cross crack-

ing plant. Another one was the license agreement between the Gasoline Products Company and the Champlin Refining Company, and the third one was a guarantee of performance given by the Gasoline Products Company guaranteeing the performance of that cracking plant.

Mr. Marsh: I don't think it is necessary to identify this with these papers.

The Court: No. Everybody knows.

Mr. Marsh: Everybody knows which ones we mean.

The Court: Yes.

Q. You took these papers signed by Mr. Champlin, these three papers——

Mr. Glasser: Mr. Marsh. (Mr. Marsh confers with Mr. Glasser.)

Mr. Glasser: Let him alone. You are still working on February 26th?

Mr. Marsh: I am afraid it will take another half an hour to cover this.

The Court: Have you finished that 26th day of February?

[fol. 612] Mr. Marsh: Just one or two more little questions.

The Court: Finish the 26th of February.

Mr. Marsh: All right. Will you read me the last question?

(Question read.)

Q. Now what did you do with these when you left Enid? These three papers that have just been described?

A. Well, there were more than three. I mean there was two copies of the construction contract, as I recall it, and two or three copies of the license agreement. Anyhow there was at least two copies of each agreement. I took those with me to Kansas City.

Q. What did you do with them then?

A. I mailed them to the New York office of the Kellogg Company.

Mr. Marsh: I think that is a convenient place to rest.

The Court: Very well. We will rest until to-morrow morning at half-past eight, standard time.

(Suspended.)

Forenoon Session (Wednesday, May 1, 1929)

The Court came in at 8.30 a. m., standard time.

P. C. Keith, Jr., on the stand.

Direct examination resumed.

By Mr. Marsh:

Mr. Marsh: Before proceeding with the witness, Your Honor, I would like to read into the record a few very obvious corrections of yesterday.

On Page 655, first, in the third question or second question from the bottom of the page, the question, "Do you consider that the so-called phase treating system has been a success, commercially?" I am quite sure that that referred to "liquid phase treating" on that page.

Then on Page 658, in the answer to the second question, again this expression appears "phase treatment," and I am quite sure it was "vapor phase treatment." The answer to the second question on Page 658.

[fol. 613] Mr. McKeever: Is that Dr. Cross's testimony?

Mr. Marsh: In his cross-examination, yes. I haven't been over it with him, but I am quite sure it should be.

Page 659, the same omission in the last answer on the page, when he said, "Based on the claim I had the opinion that it did not cover all the phase treatment." That was "vapor phase treatment," as I remember it.

Mr. McKeever: I am satisfied——

Mr. Marsh: I am quite certain from the context.

Mr. McKeever: If the context shows that I don't care to take time to examine it.

Mr. Marsh: Page 703, where Dr. Cross has testified, giving the purpose of the doctor's solution treatment, he said, "Into sulphur compounds of less essential odor," and I am quite sure he said, "less offensive odor." The fith line on Page 703.

Mr. McKeever: Yes, I think so.

Mr. Marsh: Then two lines below that the word "catalytic" agent is referred to as "cataleptic" agents. I am quite sure that is not quite right.

On Page 722, in referring to the time it would take to build continuous treaters, the answer to the first question,

the minutes show "six months," and I am quite certain it was "six weeks." I can put Dr. Cross on the stand if there is any question as to that.

The Court: He said "six weeks."

Mr. McKeever: He didn't say "six months." I am quite sure of that.

Mr. Marsh: Page 724, about the middle of the page, there is a question as to the sulphur content of some kind of crude. It says "Saybold." I am sure it was Tonkawa that was being discussed at that time.

Mr. McKeever: I don't know what crude he was discussing, but the word is wrong undoubtedly.

Mr. Marsh: It was either Tonkawa or Garber.

[fol. 614] Mr. McKeever: It couldn't refer to Saybold crude. That is a test.

Mr. Marsh: There were things that were somewhat misleading.

On Page 725, the last line, there was a question which appears here as "Could you make any assumption as to the basis of that answer," and I am quite certain that what I asked was, "Did you make any assumption." It would be hardly sensible the other way.

On Page 726, about five lines from the bottom, it referred to gasoline which would be produced by that "belding" operation. Now that was "blending operation."

Page 733—I am not taking them all up, but the ones that would change the sense—Mr. Welling was quoting from the by-laws of the Cross Development Corporation, and this sentence appeared:

"The board may create such other executive officers including additional vice presidents who need not be members of the board and in its judgment may be necessary." It was: "As in its judgment may be necessary."

Page 777, the last line, there was a reference to conferences had with Slater, and Mr. Champlin, or both, "in February, 1925." I am quite sure that was in "December, 1925." Mr. Keith hadn't been employed until nearly seven months after February, 1925. You remember that?

Mr. McKeever: I don't remember it, but I am sure you are correct. It would be "December, 1925." It couldn't be any other time.

Mr. Marsh: I was leading him up to this ——

Mr. McKeever: I will admit you were leading him.

Mr. Marsh: You told me I was.

Page 779, it refers in an answer at the top of the page to "rotary coil." It was "rotary kiln."

I am sorry to have kept you so much time.

[fol. 615] Q. Mr. Keith, in the course of your examination yesterday you referred to a communication that you sent to Mr. Harvison or that you received from Mr. Harvison, in connection with one of these times when you asked him to come out and then countermanded it, and Mr. McKeever asked for the telegram that refreshed your recollection.

(Document passed to Mr. McKeever by Mr. Marsh.)

Mr. McKeever: No objection.

(Document marked Plaintiff's Exhibit No. S.)

Q. I show you telegram marked Plaintiff's Exhibit S, and ask you if you remember of receiving that telegram?

A. Yes.

Mr. Marsh: I will read it to the jury (reading):

"Kansas City, Md., Jan. 29, 1926.

Mr. P. C. Keith, Jr.
Adolphus Hotel,
Dallas, Texas.

Following wire from Harvison at New York quote will defer trip to Enid await further advice from you would it be possible to meet Champlin in Chicago unquote kindly acknowledge.

Mable C. Campbell."

Q. Who was Mable C. Campbell?

A. She was my secretary.

Mr. Marsh: I offer that in evidence.

The Court: Admitted.

Q. Now, Mr. Keith, just before we adjourned yesterday we were discussing the conference and the events that took place on February 26th on the occasion of your visit to Enid, and you had stated that you had received the signed contracts from Mr. Champlin, that is, the structural con-

tract, the guarantee contract, and the license contract; that you had taken those away with you. I think I am repeating the substance of that testimony. Now where did you take those contracts to?

A. To Kansas City.

Q. What did you do with them?

A. Why, I sat down and wrote Mr. Harvison a letter of transmittal, sending those contracts to him.

[fol. 616] Q. Now I hand you a paper which was marked Plaintiff's Exhibit No. D for identification and was excluded in connection with Mr. Harvison's testimony, and ask you to look that over for the purpose of refreshing your recollection. Now, Mr. Keith, is that a file copy taken from your files?

A. I think so, yes. It may be a copy of a file copy.

Mr. Marsh: That is right because there are no holes in it.

Mr. McKeever: Will the Court please bear with me a minute while I read this.

The Court: Are you going to offer that in evidence?

Mr. Marsh: I was going to ask him some questions on it and then offer it if Mr. McKeever desired it.

The Court: I understood it had been previously offered and excluded.

Mr. McKeever: Under Mr. Harvison's testimony.

Mr. Marsh: This is a letter from Keith to Harvison. I want it primarily for the purpose of refreshing Mr. Keith's recollection.

The Court: He has already refreshed his recollection, hasn't he?

Mr. Marsh: Yes.

The Court: Perhaps you may inquire of him. If you are not going to offer that in evidence, I do not think we need to wait.

Mr. McKeever: I object to it. It is a long letter. It is merely a recitation of a lot of immaterial matters, some of which can only be self-serving. It is not any matter that they could legally offer in evidence.

The Court: I don't think you understand it has already been excluded.

Mr. McKeever: He is trying to make some of it competent by this witness.

The Court: Not that I am aware of. He has asked the witness to use that as a memorandum to refresh his recollection, and he has done so. Now you may ask the witness any questions.

Mr. McKeever: With that explanation, of course, there is no objection.

[fol. 617] Q. Upon the basis of your recollection as refreshed by this letter—first, I will ask you what was that letter?

A. That letter was a letter written to Mr. Harvison of the M. W. Kellogg Company, telling him——

The Court: You will have to leave that out. Leave out what the letter said.

Mr. Marsh: I simply want to identify it as a letter that was used in transmitting these contracts.

The Court: He can state it is a letter to Harvison dated so and so. That is all he can state.

Mr. McKeever: I desire to make this observation; that in refreshing his recollection he cannot tell what is in it——

The Court: It is like any case where a witness refreshes his recollection. He testifies not from the letter but from his recollection as refreshed. You cannot get that letter in indirectly.

Mr. Marsh: I do not want to prove the letter. I was trying to identify it in its proper course——

The Court: Leave the letter out of consideration and ask him his own recollection refreshed as it may be by that letter.

By Mr. Marsh:

Q. Having refreshed your recollection by examining this letter, will you state whether any conditions and, if so, what, were cast upon the delivery of these contracts by Mr. Champlin at the time of their delivery to you in Enid on February 26th?

The Court: I think what you should ask him is what Mr. Champlin said with relation to the delivery of these contracts.

By Mr. Marsh:

Q. What did Mr. Champlin say to you in connection with the delivery of those three drafts signed by him?

A. Mr. Champlin said I wasn't to tell anybody that the contract had been signed because up to that time his financing had not been finally finished and he didn't want anybody to know that he had signed these contracts, nor did he want the Kellogg Company to commence any construction work or do any work in their shops until I had further notification from him.

[fol. 618] Q. Will you state now whether you received such a further notification?

A. Yes, sir; I did.

Q. I show you paper marked "Plaintiff's Exhibit T," and ask you whether you recollect receiving that?

A. Yes, sir.

Q. Will you state where you received that, if you remember?

A. I don't recall. Probably Kansas City.

Mr. Marsh: I offer this in evidence.

Mr. McKeever: No objection.

("Plaintiff's Exhibit T" admitted in evidence.)

Mr. Marsh: (Reading "Plaintiff's Exhibit T"): This is a memorandum dated apparently February 28th, reading as follows:

"Dear Mr. Keith: Our bonds went over so there is nothing to prevent going ahead with the cracking stills. H. H. Champlin."

Q. Now, Mr. Keith, when did you receive back these signed papers from New York, and in what shape were they?

A. I received the papers from New York somewhere around March 12th.

Q. Will you state as to each of these three papers how you received it?

A. The construction contract came back essentially as had been written in Enid. The guaranty contract came back with some notations and deletions from it, but on the same paper that had been used at Enid. The license agreement came back completely re-written.

Q. Will you state the changes that were made between the drafts signed by Mr. Champlin on February 26th in

Enid and these re-written papers that you received from New York?

A. The construction contract had not had the Champlin Refining Company's seal put on it, neither had it been signed by the Champlin Company's secretary. That is all I recall that was wrong with that one. The guaranty contract had one whole paragraph or clause stricken out in which Mr. Champlin or the Champlin Refining Company had been guaranteed that if any lower royalty rate were [fol. 619] granted to any subsequent licensee that Mr. Champlin would get the benefit of that reduction in royalty.

Q. What was done with that clause?

A. That was taken completely out of the guaranty contract and put into the license agreement, or a modification of that clause. The license agreement was changed also in regard to the method which would be pursued in defending the Champlin Refining Company from a patent infringement suit if such suit was started.

Q. What did you do with these papers that you received from New York?

A. I took them to Enid and took them over to Mr. Champlin's office, and we discussed each one of these contracts.

Q. Do you remember what day you reached Enid on that occasion?

A. The nineteenth or twentieth. The twentieth I recall.

Q. Proceed then, and say what was said?

Mr. McKeever: March the twentieth?

A. March the twentieth, 1926. I took those papers over to Mr. Champlin and explained the reason for making changes that had been made. We discussed them quite at some length and Mr. Champlin decided to initial the guaranty contract, to have the company seal put on the construction contract and to re-sign the license agreement.

Q. What happened to the license agreement that had been partly signed by Mr. Champlin on February 26th?

A. I don't recall whether I destroyed that or whether I gave that to Mr. Champlin to destroy. In any event my recollection is that it was destroyed.

Q. What other discussion took place between you and Mr. Champlin on that occasion, if you remember?

A. Well, Mr. Champlin was in quite a hurry that morning, and he was quite upset. He was taking his son to Baltimore

to Johns Hopkins hospital, and during the course of the morning the Cross vapor treating system was discussed and Mr. Champlin said that whereas he was going to Baltimore he probably would have some time in Baltimore, would I [fol. 620] have Mr. Schofield send him such papers as Mr. Schofield had when Mr. Schofield had previously seen him, and that he would get an opportunity to go to Washington and place this patent situation before some patent attorney of his own choosing. Also at that time he said that there was a possibility that he might be able to go on to New York and discuss the patent situation there.

Q. Did you make the arrangements that he requested?

A. I got in touch with Mr. Schofield and asked Mr. Schofield to send to Mr. Champlin the papers which he had requested and asked him to send them to Mr. Champlin at Baltimore.

Q. In the course of the defendant's proof reference was made, I think, to telegram of March 29th by the Champlin Refining Company or Mr. Champlin to Cross Engineering Company. "Defendant's Exhibit 13" was a telegram directed to Cross Engineering Company, Kansas City, Missouri: "Send plans and specifications of Cross towers and supports. Signed, Champlin Refining Company. Do you remember the receipt of that telegram?

A. No, sir; I do not.

Q. Will you state where you were on that date, if you can?

A. I don't know where I was, except that I must not have been—was not in Kansas City. I don't remember receiving that telegram.

Q. Will you state what visits you made to Enid between the date when these contracts were finally signed and delivered, as you have just related, and May fifteenth?

A. I don't think I was there May fifteenth. I don't think I made any visits to Champlin between the time of the signing of those contracts and the latter part of May.

Q. Upon what do you base that statement?

A. Upon my expense account.

Q. When did you next hear from Mr. Champlin as you recollect?

A. About March the twelfth or thirteenth I had a telephone conversation with Mr. Champlin.

[fol. 621] Q. Do you mean March?

A. May.

Q. And what did Mr. Champlin say to you on the telephone?

A. Mr. Champlin called me or I called Mr. Champlin, I don't recall which; but in any event I was in Kansas City and talked with Mr. Champlin over the telephone, and Mr. Champlin told me that he and Mr. Glasser wanted to go to New York to discuss this patent situation and would I arrange to have Mr. Schofield in New York so that they could discuss with him the patent situation.

Q. What did you do upon receipt of that telephone message?

A. I wired Mr. Harvison.

Q. What did you do yourself about it? Did you take any action about it other than wiring Mr. Harvison?

A. I went to New York.

Q. When did you go to New York?

A. I went shortly thereafter. I arrived in New York, I think, on May seventeenth.

Q. Now, the testimony has described at considerable length a conference that took place in Mr. Harvison's office on May 18th. I will ask you whether you remember attending that conference?

A. Yes, sir.

Q. Will you state who were there besides yourself?

A. Mr. Glasser, and a gentleman whom I recall as Mr. Jameson——

Q. Is Mr. Jameson present in the court room?

A. I think so; although I only saw Mr. Jameson once and I wouldn't be certain.

Mr. McKeever: He is here.

A. And some other gentlemen, I believe; Mr. Kellogg, Mr. Harvison, Mr. Ramsay Hoguet and myself.

By Mr. Marsh:

Q. Will you state what, if any, statements were made in reference to the Cross vapor phase treating matter at that conference?

A. Mr. Glasser stated that they had come on to New York, or rather he had come on to New York to discuss the patent situation, and particularly to discuss that patent

situation with Mr. Schofield. He wanted to know where Mr. Schofield was.

[fol. 622] Q. Where was Mr. Schofield, if you remember?

A. Well, my recollection is that he was down on the American Refining Company's suit at Wilmington. And it was told Mr. Glasser that Mr. Schofield was out of town and wasn't available, and it was suggested, and I think the suggestion—anyway, Mr. Houget was called over; now, whether they called him over after Mr. Glasser got there, or whether he was on the way over when Mr. Glasser got there, I don't know; but he came in after Mr. Glasser got there, I recall, I think, and at that conference,—well, the gist of my recollection is this: That Mr. Harvison and Mr. Kellogg told Mr. Glasser that, on account of Gray's commercial position, and the fact that he had developed this process in the trade and under some difficulty, that they thought that would have considerable bearing in a Patent Court, should the Champlin Company put in a Cross vapor phase treater and Mr. Gray sue. They further stated that they were certain that if any Cross vapor phase treater were put in that Mr. Gray would sue. Mr. Houget, as I recall it, stated at that time that he had seen some patent applications of Gray's which were in the Patent Office; that he had talked with the Sun Oil Company's attorneys—the Sun Oil Company had made an extensive search of Gray. I believe it was said that they first thought they wouldn't pay royalty, and later, upon investigation, decided that they would; that it was his opinion that due to these new patent applications in the Patent Office that Gray's position was materially strengthened and would cover a vapor phase treater. Mr. Glasser or Mr. Jameson,—I remember Mr. Jameson's making one remark; he wanted to know how it was that it had been told Mr. Champlin in Enid that there was—that this Gray patent wasn't as broad as it seemed to be, and now the opinion was reversed and it seemed to cover everything. Mr. Jameson brought up the point that the Champlin Refining Company would have to pay ten cents per barrel royalty on the charging stock, which, in itself, was a considerable sum of money, and if they were forced to pay six cents a barrel more on account of having to pay Gray royalties that it would be excessive.

[fol. 623] That they had thought they were going to get a process which would treat this gasoline royalty free, and that it had been represented to Mr. Champlin that these patents were not as broad as they were now represented to be. Mr. Kellogg, as I recall—either he or Mr. Harvison or someone in the conference—suggested that it would be a wise thing to do if Mr. Glasser and the gentlemen who were with him would discuss the matter with Mr. Gray, at that time. An appointment then was made, I think, from that office for Mr. Glasser to go over and see Mr. Gray.

Q. And does that state the substance of the discussion, as you remember it?

A. To the best of my recollection. Yes, sir.

Q. Well, what happened next in the chain of events, as you were connected with it? Did you return to the west, after that conference?

A. I returned to the west, and on May 27th I went to Enid.

Q. What occurred on May 27th in Enid?

A. I saw Mr. Champlin and Mr. Glasser at that time.

Q. What did they state to you, or what did either of them state to you?

A. I remember the gist of the conference was this: Mr. Glasser was somewhat put out because he had gone to New York to see Mr. Schofield and hadn't seen him. Mr. Glasser related to me in substance—I say in substance; he related to me some of the instances that occurred in Mr. Gray's office. He told me that Mr. Gray was quite vindictive regarding Mr. Harvison, and Mr. Gray told Mr. Glasser that Mr. Harvison was responsible for Mr. Champlin going ahead, or not going ahead with the Gray towers. They—I say they meaning Mr. Champlin and Mr. Glasser—didn't understand why they received one report that the Gray patent covered everything, in New York, while it had been told Mr. Champlin, by Mr. Schofield, at Enid, that Gray's patent covering broadly the use of Fullers Earth and a vapor phase tower, was antedated by these German patents and to Earnside and Thompson, and while——

[fol. 624] Q. Did you make any explanation at that time with reference to that difference of opinion?

A. I made the explanation as I understood it. Yes, sir.

Q. All right. What was that explanation?

A. That Mr. Schofield was familiar only with the patent as issued to Gray, while Mr. Hoguet had seen patent applications pending in the Patent Office which he seemed to think strengthened very much——

Q. Whose patent application? Or applications?

A. Mr. Gray's. At that conference the advisability of putting in—Oh, first, at that conference, also, Mr. Champlin was quite perturbed. He said: "Here, suppose we go ahead and put in this Cross vapor phase treater. If you people are now convinced that it would be an infringement of Gray, that has weakened materially any defense which you might make of me, if Gray brings suit for infringement."

Q. When you say "you" who do you mean, there?

A. I meant the Cross Development Company. And we discussed at length the advisability of putting in Gray towers and putting in the vapor phase treater.

A. Well, what happened next, after that conference?

A. Well, it was decided at that conference that I should go to Kansas City and make up designs and estimates covering the cost of installing a vapor phase treater.

The Court: Which kind? You have said "vapor phase treater." Which kind have you referred to?

A. I can't recall, Your Honor, whether it was Cross or Gray.

Q. Well, was that done?

A. Designs of the tower were made up in Kansas City——

Q. By whom?

A. By Mr. Mitchell.

The Court: You just said, a minute ago, that you don't recall whether it was Cross or Gray. What about the copperized Fuller's Earth element?

A. That is what I don't recall, Your Honor. Whether I left with the impression that I was to design a Cross vapor phase treater or Gray vapor phase treater. In any [fol. 625] event the designs were to be made up and Mr. Champlin was to make a final decision based on those designs.

Q. What next occurred in Kansas City, Mr. Keith?

A. I went to Kansas City and got in touch with Mr. Mitchell, and Mr. Mitchell, in company with myself, had a conference with Dr. Walter Cross, on the first floor of number 700 Baltimore Avenue.

Q. What did Dr. Cross tell you at that time?

A. It must have been Cross towers we were discussing in Enid, because I went down to Dr. Walter Cross to get from him his ideas on a Cross vapor phase treater. When I talked with Dr. Walter Cross he told me that he had found out since that the regeneration of this copper would be an extremely expensive process, and if it were reburned in a rotary kiln that there would be considerable copper lost, and it was his opinion at that time that the treating cost on account of this complication would be quite excessive.

Q. Will you state upon what occasion you first learned that the copper treating cost would be expensive? Or excessive?

A. That is the first time I knew that the treating with this copperized clay would be expensive, probably.

Q. Your understanding differs from that of Dr. Roy Cross, who testified yesterday?

A. Yes, sir.

Q. How many times had you seen Dr. Roy Cross prior to January, 1926, if you remember?

A. Well, I don't know how many times I had seen him. I remember we had a conference—well, I came with the Cross Engineering Company and I saw him every day I was in the laboratory. He had an office right there.

Q. How many times did you discuss with Roy Cross the matter of the Cross vapor phase treating, before January, 1926?

A. Only once that I recall.

Q. Now, having received this information from Dr. Walter Cross, what action did you take?

A. I told Mr. Mitchell to go ahead and make up designs on Gray towers. I told Mr. Mitchell, also, to go down to Enid and tell Mr. Champlin that that business of using [fol. 626] copperized clay would prove apparently too expensive, and to see if Mr. Mitchell could have Mr. Champlin take a liquid phase treater at Dallas, or if he would buy a Gray vapor phase process.

Q. Did Mr. Mitchell make this trip in accordance with your instructions?

A. Yes.

Q. What did he report to you?

A. Mr. Mitchell made one or two reports. The first one or two reports he told me that he thought Mr.——

Mr. McKeever: I object.

The Court: It may be excluded.

Q. Did your instructions to Mr. Mitchell relate to any other method of treating, and if so what?

A. I don't know whether they related to acid treating and re-running or not. I know they related to the liquid phase treater at Dallas. I believe that was—and the Gray vapor phase treater, as I said.

Q. Well, what was the next step in this chain of circumstances concerning yourself?

A. Well, I went down to Enid on July 17th.

Q. What happened in Enid on July 17th?

A. I emphasized to Mr. Champlin the excessive cost feature of that Cross vapor phase treating tower. About that time, too, I told Mr. Champlin, however, that if he wanted to go ahead with the proposal of February sixth and accept that proposition that we would go ahead and put in this equipment.

Q. What did he say to that?

A. Mr. Champlin said no, that there was a tacit agreement or tacit understanding or it was understood that if he took this proposal of February the 6th that the treating cost would not be excessive. I told Mr. Champlin that the letter contained no reference to the treating cost, that I had made no representations concerning the treating cost, and he knew it was experimental, we were convinced it would give the chemical result as set forth in that letter and that if he would accept that letter we would go ahead. [fol. 627] He said no, that if we went ahead and gave the chemical results as outlined in that letter, but the treating cost was high, why he wouldn't pay for the installation. At that time I discussed with him the advisability of putting in Gray vapor phase treaters. I believe it was at that conference that I made the first of a series of propositions.

As I recall it, I made the proposition covering the royalty payment to be made in case the Gray tower was put in.

Q. What was that proposition?

A. I don't think it was definitely stated at that time, but it was either this or the next visit that I told him that the Kellogg Company were attempting to make a trade with Gray, I think I told him that on this earlier visit, and on account of that that it was possible to get a reduction in the royalty rates. I also told Mr. Champlin that if he wanted to go ahead and put in clay towers that the Cross Engineering Company would design these towers, would prepare a bill of material and would send down a construction superintendent to supervise the job, do this at no cost to Mr. Champlin, if Mr. Champlin would not insist upon an outside defense to patent suits.

Q. What did Mr. Champlin state with reference to any of those propositions?

A. Mr. Champlin did not make up his mind at that time and I had the impression that he would accept.

Mr. McKeever: Just a moment.

Mr. Marsh: I asked him what Mr. Champlin stated.

The Court: Confine it just to what he said.

Q. What did Mr. Champlin state to you at that time in reference to it?

A. I don't recall the conversation, except that there was no decision made.

Q. Did you see Mr. Slater on the occasion of this visit in the middle of July, do you remember, Mr. Phil Slater?

A. I think so; yes, sir.

Q. You don't recall any specific conversation, however?

A. I don't recall any specific conversation with Phil Slater.

Q. When did this matter next come up for discussion?

A. Well, Mr. Champlin a couple of days later wired me [fol. 628] in Kansas City. I had gone to Kansas City to rush work in Gray towers, and then I got a telegram from Mr. Champlin which held that up.

Q. That was one of these telegrams in the record, I believe. You remember that? The little short telegram from Mr. Champlin I think the 19th of July. I guess I didn't put it in. I don't see it there. I think it was either

the 18th or the 19th of July. Maybe you didn't put that in. It is one of the ones I gave you. Well, it isn't important. What was the substance of that telegram, Mr. Keith?

A. I think the telegram said "Can permit no deviation from written contract."

Q. That was the substance as close as you can remember it?

A. That is as close as I can remember it.

Q. Well, what happened next?

A. I went back to Enid on or about July the 27th.

Q. What happened on the occasion of that visit to Enid?

A. In the meantime I had gotten in touch with the Kellogg Company in New York and had learned in detail a proposition which could be made to Mr. Champlin covering the installation of Gray treating towers.

Mr. McKeever: Just a minute before he proceeds with that. That telegram, the witness undertakes to relate what was in that telegram, and it might become of some importance. I wish you might——

Mr. Marsh: We will try to find it.

Mr. McKeever: Try to find that telegram.

The Court: Hasn't he put that in?

Mr. McKeever: I find one in language similar to the Kellogg Company. But not one to the Cross Engineering Company or to Mr. Keith.

The Court: If you don't find it, I will have that struck out.

Mr. McKeever: I think Mr. Keith may have in mind one that was sent to the Kellogg Company by whom he was employed. I don't believe we sent any such telegram.

A. I don't recall who it was sent by. Sent to me in any event.

[fol. 629] Q. Now you proceed with what occurred at Enid on July 27th or whenever this conference was?

A. I went down to see Mr. Champlin with the details of a proposition which could be made on the Gray towers and discussed that proposition with him.

Q. When was that?

A. On July the 27th. I went down there to confirm a proposition which as I recall I had made previously on July 17th.

Q. Just a second. I want to see if I can find that telegram. Well, did you transmit this proposition, whatever it was, to Mr. Champlin?

A. Yes.

Q. In what terms did you offer it to him?

A. I told Mr. Champlin at that time if I hadn't already told him previously, which I think I did, the Kellogg Company were attempting to complete a deal with the Gray Process Corporation whereby the Kellogg Company would sell the Gray process, that because they were in that position they had managed to get this proposition from the Gray Company. That Mr. Champlin would be asked to pay—the details may be off one way or the other—four cents a barrel on every barrel treated, it being understood that the plant would make twelve hundred barrels a day for three years, so that the lump sum royalty would be $76,000. By lump sum royalty I mean that he would be asked to pay that much, and then the process would be free to him for that installation forever afterwards. That the Kellogg Company had a commission which I believed amounted to 20% of this lump sum royalty payment, that that 20% to the Kellogg Company would return to Mr. Champlin so that he would be asked to pay $57,000. A certain percentage of this $57,000 was to be paid in cash, a small percentage, as I recall it, and the remainder of the payments would be stretched out over a period of time not to exceed a year. I told him that if he went ahead with that proposition that I would furnish him drawings and an erection superintendent to proceed with. Mr. Champlin didn't like that proposition and turned it down.

[fol. 630] Q. What else occurred?

A. I again told him that if he would accept the proposal of February the 6th as the proposal was written, that we would proceed, and it was at that time that Mr. Champlin called to my attention one tower, and I told Mr. Champlin, "Well, if you sign this letter of February the 6th we will put in three towers." The only——

Q. When you say "we," whom did you refer to on that occasion?

—. The Kellogg Company and the Cross Engineering Company. I think the Kellogg Company had gotten that agreement from the Gasoline Products Company. Mr.

Champlin said no, that he would not do that because it was understood in the beginning that the treating cost was to be reasonable. I told him that we had—I had come down and told him that the treating cost would be excessive and that if we put these towers in he would have to agree to reimburse us for the cost of them if they treated the gasoline as outlined. He said no to that. That he would not give me any acceptance of the letter of February the 6th or he would not accept the proposal of February the 6th without a reservation which he stated to me of the treating cost. Then I told Mr. Champlin that the Cross Engineering Company or the Kellogg Company bought it at that time, that if he wanted to go ahead with clay towers on his own responsibility, that I would furnish him with drawings and with a construction superintendent, he to purchase the material and to be billed to him direct, if he would not insist upon a defense—outside defense of patent suits, and this Mr. Champlin refused.

Q. Did you discuss any other methods of treating on that date?

A. I don't think at that time any other method was discussed with Mr. Champlin. It may have been.

Q. What happened next after that conference?

A. At that time I think I discussed with Mr. Phil Slater the possibilities of acid treating and re-running. Whether it was that conference or the next one, I am not sure.

Q. Will you state the substance of that conversation with Mr. Phil Slater on that subject, whether it was a——

[fol. 631] A. I will take it back. It was Mr. Phil Slater and Mr. Ernest Slater at the next conference.

Q. When was the next conference?

A. It was on or about August the 13th. Oh, there is one thing. In the other conference which Mr. Champlin told me, he wanted the Gasoline Products Company to write him a letter saying that the Cross Development Company would not proceed with the installation of these towers. I told Mr. Champlin that they would not write such a letter because they would proceed with the installation of these towers if he would accept the conditions as laid down by the letter of February the 6th. That the Cross Development Company could not ethically do that, withdraw that proposition, because I considered it a more or less a breach

of promise, they had offered to put in the towers and they had not been accepted, and they would not withdraw that until Mr. Champlin—until later, if he would accept it we would still go ahead. He was quite insistent that the Gasoline Products Company write him a letter saying that they would not put in these towers, and I was just as insistent that they would not do that because they stood ready and willing to put in the towers.

Q. Did he tell you why he asked them to write that letter? As you remember it?

A. My recollection is this: I told him or asked him would he start a lawsuit, he told me he would not start a lawsuit about these towers. Then I asked him would he hold up his royalty payments to Gasoline Products, and that he would not answer, whether he would hold up the royalty payments or not.

Q. Now let's go to the next conference, Mr. Keith, when you said you were down there on August 13th, as I remember it. Whom did you see on the occasion of that visit to Enid?

A. I recall I had a conference with Mr. Champlin by myself in the morning. What took place at that conference, other than probably a re-hash of these other propositions, I don't recall, but that afternoon I had a conference with Mr. Champlin and Mr. McKeever, and Mr. M. A. [fol. 632] Hayes. M. A. Hayes was M. W. Kellogg Company's construction superintendent.

By Mr. McKeever:

Q. What was that date, Keith?

A. That was August 13th or thereabouts.

By Mr. Marsh:

Q. Will you state, if you remember, what was said by yourself to them or by them to you?

A. It was again going over the proposals which I had made on January 27th, pointing out to Mr. Champlin that the cost was high.

Q. January 27th?

A. July 27th. Pointing out that the cost of using this copperized clay would be excessively high in our opinion.

If however he wanted to go ahead with that proposal, that if he would accept that proposal, and not insist that the tower was operated as cheaply—I think Mr. Champlin used the word "Gray"—as cheaply as Gray towers, that we would go ahead and put those towers in; that if he didn't want to do that, we would get him this license from Gray at a reduced rate; that if he didn't want to do that, we would put in these clay towers, doing all the engineering and engineering supervisory work for nothing for Mr. Champlin, and let him defend his own patent suits.

Q. What did Champlin say?

A. Mr. Champlin refused that, and I think at that time Mr. McKeever brought up the question of the royalty which was to be paid to the Gasoline Products Company, because this company was to be paid this ten cents a barrel. He thought that that was enough and that somebody was trying to get out of a patent suit or a proposal which had been made. I told him we weren't trying to get out of a proposal but we wanted the proposal accepted as it had been made.

Q. Were any of those alternative propositions accepted?

A. No, sir.

Q. Did you see Mr. Slater on the occasion of that visit?

A. Yes, I saw Mr. Slater and Mr. Ernest Slater.

Q. What did you say to them?

A. They came down to the hotel that night and they were going ahead, Mr. Champlin told me, with the installation of their own towers. I had these few drawings which [fol. 633] amounted to little more than line drawings that had been made up by Mr. Mitchell, so I told Phil Slater that if it would save any time and be of any assistance to him, I would give him the drawings which we had prepared. He said he thought it would save some time, although he thought he could get a design of the Gray towers from the Kansas City Structural Steel in the event he took the towers. At that conference or at that time it was discussed—the possibility of acid treating and re-running.

Q. What was said about them?

A. There was an old agitator sitting out behind the continuous crude battery, whose top was partially eaten away. I suggested that this agitator be used as a batch agitator but, in place of blowing the acid into the oil, that a centrif-

ugal pump be installed and circle from the bottom of the agitator back to the top to get a mixing. At that time there were a number of shell stills lying idle. My recollection is——

Q. You refer to Champlin shell stills?

A. I refer to Champlin shell stills. They were either near the middle battery—his battery at that time was arranged with a bank of shell stills which were doing the crude distillation, and next in line—I have forgotten, but somewhere down the line near the middle and near the end nearest the contact filtration plant—was some shell stills lying idle, and it was suggested that this agitator could be used to acid-treat and that these shell stills could be used to rerun it, although they would have to put on one of those shell stills a bubble tower to remove all the gasoline from this unfinished gasoline.

Q. What would have been the cost of fixing up this agitator and putting on this bubble tower?

A. Well, fixing the agitator—this is purely a guess.

Mr. McKeever: Then I object to it, if Your Honor please.

A. Purely an estimate.

The Court: I think you ought to come a little nearer than a guess.

Q. Do you remember whether Mr. Slater made any estimate as to that cost and, if so, will you state what that estimate was?

A. I don't believe he did. I estimate the cost of putting [fol. 634] in a centrifugal pump, an acid blow case, with lines, and with pumps to pump the unfinished gasoline over and to pump it back, oh, probably at thirty-five hundred to four thousand dollars.

Q. Have you installed apparatus of that kind?

A. Of a batch agitator with a pump?

Q. Yes.

A. No; I have installed continuous treaters, but no apparatus like that.

Q. Are you familiar with the price of that type of material?

A. Familiar, because the equipment would only involve the pumps and acid blow case, all of which are used on continuous treaters.

Q. You haven't stated what would be the cost of the bubble tower that would have to be added to the crude still?

A. I would estimate the cost of that bubble tower certainly not to exceed five thousand to fifty-five hundred dollars installed.

Q. Now you have stated that the business of Winkler & Koch, as I remember, or Keith & Winkler, was installing bubble towers, have you not?

A. That was the major portion of the business.

Q. Do you feel pretty safe on that cost?

A. I think the estimate of five thousand to fifty-five hundred dollars for the installation of a bubble tower is pretty safe.

Q. What happened next after this August 13th conference? Was anything more said during your stay in Enid relating to the contract or any contract being made?

A. No, sir; I thought that Mr. Champlin agreed to go ahead—Mr. Champlin told me he was going ahead with other towers at that time.

Q. So you left Enid, I presume?

A. I left Enid either that day or the next morning.

Q. When did you next go to Enid?

A. About the 17th or 18th of September.

Q. Well, what happened there? What did you go down there for?

A. I went down to get an acceptance from Mr. Champlin on the Cross cracking plants, to get a letter of acceptance to the M. W. Kellogg Company.

[fol. 635] Q. What if anything was said on the occasion of that visit? With reference to treating?

A. The thing was gone over again, the question of what I now have in my mind as three propositions. If he would take the Gray at a reduced royalty, if he would take the copperized clay towers and would not insist upon treating cost before he would agree to reimburse for the cost of installation, or if he would put in three clay towers and let us do the engineering, designing and construction supervision work.

Q. What did Mr. Champlin say?

A. He wouldn't accept any of those three, and at that time Mr. McKeever was in the conference again. Mr. Champlin didn't want to give the Kellogg Company a letter of acceptance, because this treating matter, as he saw it,

was not cleaned up; and Mr. McKeever or Mr. Champlin —I believe it was Mr. McKeever—sent a wire to the New York office of the Kellogg Company, stating I was there asking for a letter of acceptance, and there were some matters to be cleaned up, and they would like to get them cleaned up at this time. I importuned Mr. Champlin for a letter of acceptance on the physical construction of the cracking plant, and a letter was written. He was very kind to give me that letter and the notes.

Q. What notes were those?

A. Notes covering the payment of the cracking plant. He told me that he would sign such a letter, and that was late in the afternoon. He said late in the afternoon. I believe it was late in the afternoon. In any event I was going to catch a train down to Frisco station. Mr. Champlin told me that he would bring such a letter and notes down to the station, which he did.

Mr. Marsh: I think that is all, Your Honor.

Cross-examination.

By Mr. McKeever:

X Q. Mr. Keith, as I understand from all this evidence we have had now, you succeeded Mr. Harcourt in the Cross Engineering Company?

A. No, sir.

X Q. You knew Harcourt?

A. Yes, sir.

[fol. 636] X Q. Was he connected with the Cross Engineering Company?

A. No, sir.

X Q. But he was with Kellogg? I mean you succeeded him now to make these visits to Champlin about the Cross cracking units?

A. The Cross Engineering Company succeeded Mr. Harcourt.

X Q. You were vice president? They made you vice president, didn't they?

A. Yes.

X Q. So you came down as the vice president of the Cross Engineering Company or representing that company, you claim, and it was representing Kellogg & Company,

who was representing the Gasoline Products Company, to solicit Champlin for the Cross cracking units?

A. That is about it.

X Q. That was about your first visit. Now, Mr. Keith, was your compensation with reference to the sale of these cracking units, especially to Champlin, based on a salary or royalty, or how was it you got your pay?

A. The Cross Engineering Company was paying me a salary.

X Q. Do you know what interest the Cross Engineering Company had?

A. The Cross Engineering Company had a retainer fee from the M. W. Kellogg Company. That retainer fee covered all sales up to a considerable amount, a million two hundred and fifty thousand dollars, as I recall it. Everything beyond a million two hundred and fifty thousand dollars would be subject to a royalty from the M. W. Kellogg Company of one per cent.

X Q. That is, the Cross Engineering Company had this retainer fee and then, when the royalties started, did the Cross Engineering Company participate in the royalties?

A. There was no royalty at all. The Cross Engineering Company got only one per cent of the construction price from the Kellogg Company. They had no interest whatsoever in any royalty.

X Q. No interest in the royalty?

A. No, sir.

X Q. Did you have any individual interest in the contract outside of your employment as you claim with the Cross Engineering Company?

A. No, sir.

[fol. 637] X Q. Now the Cross Engineering Company was later sold to the Kellogg Company, wasn't it? Or they changed over?

A. Yes, sir.

X Q. When was that?

A. Sometime in June, I think.

X Q. 1926?

A. Yes, sir.

X Q. Now when were you made a vice president of the Cross Engineering Company?

A. The Cross Engineering Company was not incorporated until sometime in January. That is my recollection.

January, 1926. But at its incorporation, its first meeting, I was made a vice president. That is my recollection.

X Q. Now when you went down the first time to solicit Mr. Champlin, did you bring into the conversation anything about the treating of gasoline?

A. Yes, sir. I think that Mr. Harcourt, as I recall it, had previously made a proposition to Champlin or to Mr. Slater, and Mr. Harcourt had told me in general what such a proposition was.

X Q. Did that have to do with the Cross treaters?

A. Yes.

X Q. I believe you said in your testimony yesterday, and for the purpose of brevity I am going to hurry over this—there is a lot of it; the conversation is long—You had the authority to go ahead and negotiate your cracking units in the sale of those and also to supply the treater with them—the Cross treater?

A. I won't say that until January the ninth. It was my understanding that I had authority.

X Q. That was the time that you went over to visit Welling to get out of Welling just what you could do?

A. Yes, sir.

X Q. So that after that visit with Welling you did solicit the sale of the Cross cracking plant with Mr. Champlin which should also furnish him a vapor phase system treating tower of the Cross type?

A. Yes.

X Q. And of course there is no dispute about the question that if he got it, it was to be royalty free?

A. That was my understanding.

[fol. 638] X Q. There was no dispute about that with anybody?

A. I say royalty free in the sense that he was to pay no royalty to the Cross Development Company.

X Q. I understand that. He was to use it in connection with his Cross cracking units. You hadn't given him authority to use it with any other system of cracking?

A. No, sir.

X Q. It had to be used with the Cross cracking units if he got the Cross vapor phase system treating tower or towers, or whatever it might be, royalty free?

A. Yes, sir.

X Q. Now, did you have any knowledge about when the Gasoline Products organization began to negotiate with Mr. Gray about his towers?

Mr. Marsh: He is starting a long ways off from anything in the record. I wish he would make it clear to my witness what he wants to know.

Mr. McKeever: Your witness knows more about this than anybody else.

Mr. Marsh: My point is the same point I had before. What I think Mr. McKeever wants to ask I have no objection to; but he prefaces it by trying to hang a label on to whose process it was and who gave the authority——

Mr. McKeever: I didn't suppose Marsh would make that objection because his Gasoline Products Company have already testified that they had appropriated a sum of money, namely $25,000, for the promotion of this vapor phase treating tower—the Cross system.

(Question read.)

A. I don't know that they have been negotiating with Mr. Gray.

X Q. They didn't give you any instructions about laying off of Gray, if I may use that expression? That didn't come from Mr. Welling or Mr. Harvison?

A. No, sir.

X Q. So you don't know about that?

A. State the question about that.

[fol. 639] X Q. You didn't know that they were negotiating with Gray?

A. Who do you mean by "they"?

X Q. I will say Welling and Harvison, and not trying to define their connection now,—for somebody?

A. I knew that Mr. Harvison was negotiating with Mr. Gray. I did not know Mr. Welling was.

X Q. You went down to Enid with Mr. Harvison, and you were there together February the sixth?

A. February the fifth and sixth.

X Q. And Mr. Gray was there at the hotel also?

A. Yes, sir.

X Q. When did you discover with reference to that date that Mr. Harvison was commencing negotiations with Gray?

A. It was quite some time after that.

X Q. Can you fix it any closer than that?

A. I should say it was about in the neighborhood of three months. I can't fix it much closer than that.

X Q. That is when you got the first information of it?

A. That is when I got the first information of it; three and one-half months.

X Q. That would be along in June before you had such information?

A. I think so.

X Q. Now, when did the Kellogg Company commence the construction of the cracking units?

A. I don't recall. I don't know.

X Q. You understood when you talked to Dr. Walter Cross on the occasion you have detailed here, when Mr. Mitchell went with you—that is, you learned that day that probably the cost of copper was excessive?

A. Yes, sir.

X Q. Had you had any intimation of that prior to that time?

A. No, sir.

X Q. You told Dr. Cross at that conference that that placed you in a dilemma,—in substance that,—and asked his advice by what method you could use to get Mr. Champlin away from the Cross vapor treaters, didn't you?

[fol. 640]

A. I don't think that is exactly the substance of the conversation.

X Q. Now, you went down there?

A. Yes, sir.

X Q. What did you go for?

A. I didn't go down there.

X Q. You went to Dr. Cross's office?

A. Oh, yes.

X Q. What did you go there for?

A. I went down to ask Dr. Walter Cross his ideas of how a Cross vapor phase treater should be built.

X Q. Did you have any previous information before you went down there that the proposition to Champlin to build that was going to be withdrawn or that you were not going to build it?

A. No, sir.

X Q. Up to that minute you believed you was going to build it, didn't you?

A. No, sir; I didn't believe anything like that, because Mr. Champlin had not accepted up to that moment. You ask questions that I don't quite understand.

X Q. Oh, yes; you do, I think. I will put them so you can understand them. Repeat your purpose for going to Dr. Walter Cross's office?

A. I went down to see Dr. Walter to find out his ideas on the Cross vapor phase treater.

X Q. When was that?

A. That was early in June.

X Q. What did you want to know his views for? What were you going to do with them?

A. I was going to design and make an estimate, as I recall, of the Cross vapor phase treater.

X Q. To be used in the Champlin plant?

A. To be submitted to Mr. Champlin, to let him make a decision.

X Q. Isn't it a fact that at that conference, in the presence of Mr. Rudolph Mitchell, you said to Dr. Cross that you were to build for Mr. Champlin a vapor phase Cross treater, and that you asked him his advice, or he at least gave you advice, as to what to do to relieve you of the promise you had made to built it?

Mr. Hale: May we have that question read?

(Question read.)

A. No.

[fol. 641] X Q. You did discuss there that it should be presented to Champlin and the idea to get him to take the liquid phase, wasn't it?

A. You mean it was to be presented to Mr. Champlin that the Cross vapor phase treater was expensive and the liquid phase treater was to be brought to his attention?

X Q. Yes?

A. Yes, sir.

X Q. And also if he wouldn't take that, then you was to try to get him to take the Gray treater?

A. No; the Gray treater was the first alternative.

X Q. You think you put the Gray before the liquid, do you?

A. I think so; yes, sir.

X Q. The fact of the matter is, you didn't have any faith in the liquid one yourself?

A. That question can neither be answered yes or no.

X Q. Then you didn't know at that time whether you did or not?

A. Yes; that is true.

X Q. Then you knew the Gray would work, didn't you, and do all that was claimed for it by Gray with reference to the treatment, except, of course, it wouldn't make it doctor sweet as I understand it?

A. I think yes.

X Q. Did you instruct Mitchell to go down to Enid and see Champlin?

A. Yes, sir.

X Q. And he was to take some Gray drawings, wasn't he?

A. I don't know whether I instructed Mr. Mitchell to take Gray drawings or not.

X Q. As I understood you, you have said here that you instructed him to proceed to make some drawings along the lines of Gray's towers?

A. Yes, sir.

X Q. And you do not now remember whether you instructed him to take them to Enid; but what was he to do at Enid when he got there?

A. Well, Mitchell was to go down to Enid and explain to Mr. Champlin that this Cross Vapor phase treater, the cost of operating it would probably be excessive, and to explain to Mr. Champlin why the Cross would be excessive, and to [fol. 642] see if he could interest Mr. Champlin in either a Gray vapor phase treating tower or a liquid phase treating system.

X Q. Did you go with Mitchell?

A. I don't think I ever went to Enid with Mr. Mitchell.

X Q. I ask you if you didn't go with him the first time and you did the most of the talking, and then later you sent him down there with the plans of the Gray treater?

A. I don't think so; no, sir.

X Q. That is not your recollection anyhow?

A. No, sir.

X Q. When you went to solicit Champlin for the purchase of the Cross cracking units were you furnished any figures as to performance of that system of cracking gasoline?

A. Of cracking gasoline?

X Q. Yes; I am using "cracking" now?

A. When I first went to see Mr. Champlin.

X Q. Yes?

A. No, sir; I don't think so.

X Q. Did you arm yourself with any argument with reference to the performance of your cracking units,—your Cross units over others?

A. The first visit which I had to Champlin Refining Company,—will you please differentiate between Mr. Champlin and Champlin Refining Company? The first time I didn't see Mr. Champlin as I recall it.

X Q. When I say Mr Champlin I really mean the Refining Company. You did make for the company and presented to Mr. Champlin and Mr. Slater both, for that matter, at a later date and before purchase, an elaborate set of figures showing the performance of the plant, did you not?

A. I don't think I ever presented an elaborate set of figures. I do think I presented a set of figures.

X Q. Let it just be plain figures. You presented them, didn't you?

A. As I recall it, yes; although I am not certain about that.

X Q. Now, did you know or learn while you were negotiating with Mr. Champlin that they were going to give him this guarantee contract? If they closed up with him?

A. I am not sure.

[fol. 643] X Q. Well, you knew that was what they did, didn't you?

A. No, sir. I knew very little about it.

X Q. I understand that you and Mr. Harvison drew the contracts?

A. You asked me when we first went down to see Mr. Champlin.

X Q. I know it. But, before you got this sale over you knew that they were going to give him this guarantee contract, didn't you?

A. Some time during the investigation I found out that a guarantee contract would be written. Yes.

X Q. Did you know what would be in it, as to the guarantee?

A. At what time?

X Q. During your negotiations and before you got the sale over?

A. Did I know what would be in it? What do you mean by that?

The Court: The contents of the guarantee of performance. One of those three papers. It that it?

Mr. McKeever: Yes, sir.

A. If you mean how the cracking plant should operate; how much gasoline it would make; what the fuel consumption would be; what the length of time on steam would be; yes. I knew I had made representations to Mr. Champlin as to the Gasoline Products Company—what the Gasoline Products Company would guarantee in that respect.

X Q. Yes. That's what I mean. That is what the guarantee contract is, isn't it?

A. No, sir.

X Q. Did you make any guarantees beyond the guarantee contract?

A. No, sir.

X Q. Well, then, if you didn't make any beyond, then that would be what it is, wouldn't it?

A. I don't quite understand you. There is a lot in that guarantee contract as to how the test run should be run and who shall run it, and so forth.

X Q. Well, I am just asking about the recovery now.

A. Well, I don't know whether that is all, or not. But that is the gist of it.

[fol. 644] X Q. That is all we are charging you with. The rest of it I am not speaking about now. Now, you had some instructions from Dr. Cross about this vapor phase treater, didn't you?

A. Instructions from Dr. Cross?

X Q. Yes. Or some information. We will put it that way?

A. Which Doctor Cross?

X Q. Well, either one?

A. With Dr. Walter I had discussed it once or twice.

X Q. You had discussed it once or twice with Dr. Walter Cross?

A. Yes, sir.

(Counsel look for papers on table.)

The Court: Well, at this point we will take a recess of ten minutes.

(Recess from 10.08 to 10.18 a. m.)

X Q. Mr. Keith, I call your attention to the Defendant's Exhibit No. 69, being a letter and calculation identified here yesterday by Dr. Roy Cross as having been compiled by him, his letter and his compilations. Did you ever see that before?

A. I think so; yes, sir.

X Q. When? You may refer to the date of the letter (showing to witness)?

A. Whether I saw it on this date, I don't know, but about that time.

X Q. That is dated when?

A. December the 23rd, 1925.

X Q. Was it delivered to you?

A. Was it delivered to me?

X Q. Yes.

A. I think so; yes, sir.

The Court: Whom was it directed to?

X Q. It is directed to Gasoline Products Company, 700 Baltimore Avenue, Kansas City, Missouri. Right in that connection, Mr. Keith, did the Gasoline Products Company have an office in Kansas City at that time?

A. Yes, sir; I think so.

X Q. And Dr. Cross's office was also there, was it not?

A. Yes, sir.

X Q. And your office also?

A. Yes, sir.

[fol. 645] X Q. Now what did you do with it when it was delivered to you?

A. Well, eventually—I say eventually, shortly thereafter, I took it down or mailed it down to Mr. Slater.

X Q. The superintendent of the Champlin Refining Company?

A. Yes, Mr. P. E. Slater.

X Q. That was done prior to the consummation of your sale of the Cross cracking units, was it not?

A. Yes, sir.

X Q. Now in order that the jury might be informed as to my question I should desire to read the letter but not the computations, all of them. (Reading):

"Kansas City, Mo., December 23, 1925.

95273, Champlin heavy gas oil. 95290, Champlin light gas oil.

Gasoline Products Co., No. 700 Baltimore Avenue, Kansas City, Missouri.

GENTLEMEN: Herewith in quadruplicate are the summarized reports of cracking tests of sample of light gas oil and of heavy gas oil submitted from the Champlin Refining Company.

Please note that the yields suggested cover the manufacture of 437 degrees F. end point gasoline and good merchantable fuel oil. If larger yields are obtained than the fuel oil is not of as good a character, having a higher viscosity.

It is particularly to be noted that both these stocks yield a very light gasoline. We believe that we are perfectly safe in representing yields of sixty-five per cent on the heavy gas oil and seventy per cent on the light gas oil, provided conditions at the refinery are such as to obtain good condensation and to limit refinery losses in treating. Vapor phase treating would be desirable.

Samples of gasoline treated by vapor phase method, as made from these gas oils, are submitted herewith, together with a sample of the fuel oil made from the heavy gas oil.

Very truly yours, Kansas City Testing Laboratory,
by Roy Cross."

[fol. 646] Now that refers to the samples of oil from the Champlin Refining Company, does it not?

A. Refers to the samples of gas oil; yes, sir.

X Q. Did you take that from the Champlin Refinery to Dr. Roy Cross?

A. I don't think so; no, sir.

X Q. You think they were sent down?

A. Yes, sir.

X Q. But you did send this letter with the exhibits which you are undoubtedly familiar with, are you not?

A. In a general way; yes, sir. It has been so long I have forgotten.

X Q. You sent them to the Champlin Refining Company for their consideration?

A. I either sent them or took them down.

X Q. All right. I don't care which way. Now look at the exhibit and see if that is correct?

The Court: What is the number of that exhibit?

Mr. McKeever: I read the number in the record. I think it is 69. (Witness examines exhibit.) (Question read.)

A. I took them down to the Champlin Refining Company.

X Q. The letter and the exhibits is what I am getting at. These exhibits were with the letter.

A. I think so; yes, sir.

X Q. Now they were sent by you to the Champlin Refining Company, as a part of your argument for the Champlin people to buy your Cross cracking unit. Is that right?

A. They were sent or delivered to Champlin to show him what we thought he might expect from a Cross cracking plant.

X Q. You thought he might expect it, did you?

A. Not the yield mentioned there.

X Q. What did you send them to him for if you didn't believe them?

A. I sent those down to indicate the yield that he might expect.

X Q. Yet you didn't believe in them yourself?

A. I didn't guarantee the yield.

X Q. I didn't ask you that. Did you believe in those experiments of Dr. Cross, that they were correct, and they would do that?

A. As laboratory experiments, yes.

[fol. 647] X Q. Now my attention is called to the fact that you said yesterday in your testimony that you got these samples and took them there yourself to the Cross laboratory.

A. I don't think I so testified.

X Q. Well, all right. We will not bind you on that. I think it is immaterial. Now I will ask you what you say now, referring again in the light of your answer to the Defendant's Exhibit 69, with reference to these recoveries set out here in Dr. Cross's analyses?

Mr. Marsh: Your Honor, I don't comprehend just what the purpose of this is, but if it is intended to vary the later written guarantee contract, it seems to me it is all utterly inadmissible.

The Court: So far as I know it isn't intended to vary the written contract.

Mr. Marsh: I don't know just what its purpose it.

The Court: Cross examination. Of course he has considerable latitude in cross examination.

X Q. To correct that, Mr. Keith, your testimony was that you brought them back, the samples, that the laboratory had turned over to you. Now what was the recovery in the guarantee?

A. 65% of 437 end point gasoline, as I recall.

The Court: That is in the guarantee contract.

Mr. McKeever: Yes, sir.

The Court: In the contract.

X Q. Yes, sir. Now state to the jury what Dr. Cross's representations were with reference to the guarantee which you sent down to the Champlin Refining Company. State them all.

Mr. Hale: That question——

Mr. McKeever: Preliminary. I want to ask him another one.

Mr. Hale: Just a minute. I ask the Court to consider that question Mr. McKeever has asked about Dr. Cross's representations with reference to it. He evidently asks [fol. 648] him to testify with regard to the contents of this exhibit. Simply the results of certain laboratory experiments. Mr. McKeever is assuming that the results of the laboratory experiments are representations by somebody with reference to something.

The Court: His assumption won't bind anybody but just himself. As I understand it, Dr. Cross testified that those figures were based on a laboratory test.

Mr. McKeever: Oh, yes. There is no doubt about that.

The Court: And whatever they were, they were subsequently duplicated by the guaranty, were they not?

Mr. McKeever: We have a written guaranty.

The Court: Now he wants to know if there is any variance.

Mr. McKeever: I don't think it is very material.

Mr. Hale: He has characterized them as representations.

The Court: Well, they are representations of what the laboratory test shows. No question about that.

Mr. Hale: No question about that.

Mr. McKeever: Not a particle.

The Court: Not only representations but they are statements. Stronger than representations.

Mr. McKeever: I think so.

The Court: But based on a laboratory test.

Mr. McKeever: I can answer his question, but my position is that he doesn't need to know what is in my mind if I have the right to inquire about that.

The Court: Go ahead and ask him.

Mr. McKeever: I can't clarify for the attorneys as I go along. If I can make the Court see my position, I want to do that. What did I ask him?

(Question read as follows:) Now state to the jury what Dr. Cross's representations were with reference to the guarantee which you sent down to the Champlin Refining Company? State them all.

[fol. 649] The Court: By that question I understand he is referring to Exhibit 69 and wants you to read from it.

Mr. McKeever: I want him to state the amount there as set forth by Dr. Cross as the recovery from this Champlin oil.

A. Will you read the question again?

X Q. Let me re-state it now to you so you can get it right. Give me the amount of recovery on the light and heavy oil that the report of Dr. Cross shows?

A. Dr. Cross says this: We believe that we are perfectly safe in representing the yields of 65% on the heavy gas oil and 70% on the light gas oil.

X Q. All right. Now turn to the exhibits he has there and see what he says about it. The same thing. That is what I want.

A. You will have to show me what you want, Mr. McKeever.

X Q. I want to let the exhibits show what it says it is possible for recovery on the light oil.

A. (Reading:) Summary of cracking tests: Gravity of charging stock. 35.0 degrees Be. Color of charging stock, straw. Gravity of synthetic crude, 39.8 degrees Be.

X Q. Wait just a minute. I think you are trying to help try the case. Pardon me for the suggestion, but you an-

swer as a witness. Now what does the exhibit show with reference to these two things, you read that here (indicating) about the 65 and 70% recovery?

The Court: Of course the exhibit speaks for itself.

Mr. McKeever: I know.

The Court: But you have a right to call his attention for further questions.

X Q. That is what it is for.

A. I don't yet just understand what you want me——

By the Court:

Q. Point out what you want to the witness as a basis for further questions. The exhibit is already in and the jury knows about it.

X Q. Now, Mr. Keith, you read the letter very kindly and you referred to the recovery of the 65 and 70%. Is that commercial yield?

A. 65 and 70%?

[fol. 650] X Q. Yes.

A. That depends on how the cracking plant is operated.

X Q. Now what does the exhibit say, the exhibit attached to the letter, read right here where my finger is?

A. Safe commercial yield.

X Q. Just read what I am pointing at?

A. 70%.

X Q. Now read this and the next one?

A. Safe commercial yield, 65%.

X Q. All right. Then the exhibit corresponds to the letter. Now you knew that when you sent it down to the Champlin Refining Company, didn't you?

A. Knew that the exhibit corresponded?

X Q. No, sir; you knew what Dr. Cross's laboratory test showed the ultimate yield would be?

A. Yes, I think so.

X Q. And you incorporated that in your—the last one in your guaranty, didn't you?

The Court: What is that?

X Q. Incorporated in your guaranty contract the guarantee of 65% commercial yield?

A. No, sir.

X Q. It is in it. What is the difference?

A. The difference is in the quality of the charging stock. The charging stock mentioned in the guaranty contract I don't think is the charging stock of either one of those two.

X Q. Did you so testify?

A. I don't know. I say I don't think it is.

X Q. You took the samples down from the Champlin Refining Company, didn't you?

A. Yes, sir. I didn't take the samples.

X Q. Well, anyhow, they were sent there. You don't doubt but what they were the Champlin oils, do you?

A. No, sir.

X Q. Now you supplemented that amount of recovery and ultimate yield with certain figures to show the Champlin Refining Company how much they could make out of it, too, didn't you?

A. I may have done that, yes, sir.

[fol. 651] X Q. You also told them at the same time you were making that argument that if they would just buy this Cross cracker from you that you had authority to give them the Cross treater royalty-free with it as far as the royalties are concerned?

A. You will have to state the question again. I didn't get it all, I am sorry.

(Question read by reporter.)

Mr. McKeever: Free as far as the royalties are concerned.

A. I think that is so, yes, sir.

X Q. Now, Keith, how many vapor phase towers would it take to take care of the output of the two Cross units?

A. It would take two. Three would be preferred.

X Q. But your idea, I believe, as you said yesterday, was to have only two?

A. I don't believe I said that.

X Q. Well, I have a notation to that effect. You did say something about it, didn't you?

A. I don't think so.

X Q. Weren't the towers mentioned in your testimony yesterday?

A. Yes, tower was mentioned.

X Q. Was "two towers" mentioned?

A. I don't think so.

X Q. Well, I will have to refer to your testimony on that later. I can't stop now to settle it.

Mr. Marsh: I think I can clear that up if you want me to.

Mr. McKeever: I don't ask you to clear it up because I don't like the method of your clarification.

Mr. Marsh: All right, sir, I won't help you a bit.

X Q. (Continued): Now, Mr. Keith, I have here a notation of your testimony this morning that you told Mitchell to go ahead and make up the designs on the Gray treater and "I sent him to Enid to see if Champlin would take the Gray or liquid phase treater." That is only repeating you in substance. Was Mitchell authorized to give Champlin the liquid phase royalty-free?

A. I don't know whether there was any royalty in connection with it. There may have been. If that was the case, he was not authorized.

X Q. Then, when you instructed him to go down and see if he could get Champlin to take the Gray treater or the [fol. 652] liquid phase in place of the Cross, you have no recollection whether the liquid phase was to be royalty-free or not?

A. My recollection is that there was no royalty charge on that process.

X Q. But there was a royalty if he had taken the Gray?

A. I suppose so.

X Q. Well, you knew it, didn't you?

A. If he took a license from Gray, yes.

X Q. Well, you weren't advising him to build the Gray treater without getting the license, were you?

A. Was I advising him to do that?

X Q. Yes.

A. No, sir.

X Q. Do you know the difference between the Gray treater, the Gray liquid phase treater, and the Cross liquid phase treater, as discussed at that time with Champlin?

A. Between the Gray liquid phase and Cross liquid phase—no, sir, I don't know the difference.

By the Court:

Q. Was there a Gray liquid phase treater?

Mr. McKeever: I am mistaken now. I want to change that to vapor phase. I get confused. I will change the word to vapor phase. The two vapor phase treaters—did you know the difference between them?

The Witness: State the question again, please?

X Q. Did you know the difference at that time between the Cross vapor phase treater and the Gray vapor phase treater?

A. I knew there was a difference in the fact that Gray used Fullers Earth, and the Cross used a copperized clay. At which time are you referring now?

X Q. When you sent Mitchell down there and prior thereto? At the time you were trying to give Champlin a Cross vapor phase royalty-free, did you know that Tom Gray was claiming that was an infringement on his patent?

A. I don't know whether I knew that. If I didn't, then I suspected it. At least, that was my impression.

[fol. 653] X Q. Well, you got a pretty good impression of it the day you and Harvison were down there in the Oxford Hotel, when Tom and Harvison fell out, didn't you?

A. Yes, sir.

X Q. That was more than an impression after that, was it, Keith?

A. I knew that Tom Gray thought it was an infringement after that.

X Q. You knew before that that the matter had been discussed?

A. Yes, sir.

X Q. It is a fact, isn't it, that if you had gone ahead and given Champlin the Cross vapor phase tower and the physical construction had been made, it would have performed exactly like the Gray and exactly like the so-called German treater, except for the copper?

A. I don't know.

X Q. You didn't gather enough of information in all of your experience and education to know that?

A. I knew that the Cross treater was in the laboratory, and what it would do when it was put in the field I didn't know. I had an opinion.

X Q. Oh, you had an opinion. All right, what is your opinion?

A. I thought that a Cross treater would treat gasoline as set forth in the letter of February the 6th.

X Q. That doesn't answer my question. I am asking you what your opinion was about whether or not the Gray treater and the Cross treater and the German treater, outside of the copper, would all have done the same thing?

A. I don't know that.

X Q. Well, have you got an opinion? I didn't ask you this time if you knew.

A. If the Gray treater, the German treater and the Cross treater would all do the same thing?

X Q. Outside of the copper, until you get up to the copperization.

A. I don't know.

X Q. Well, I ask you if you had any opinion?

A. No, sir.

X Q. No opinion. Since you have no opinion on that, my attention is called back to those two towers. The question was asked, "What if anything was said as to the type of equipment that would have to be built to use it?" Answer. [fol. 654] "At that time I think we proposed using two towers, one to hold the mixture of copper and clay and the other to hold a mixture of clay and copper." That is referring to you and Welling being present?

A. Yes, sir, that is right.

X Q. So you proposed the construction of two towers instead of one?

A. For each tower.

X Q. Two towers for each tower?

A. If I may explain, Your Honor, I can explain that.

The Court: Two towers to what?

A. Each installation, each Cross plant.

X Q. Each Cross unit, is that what you mean?

A. Yes.

X Q. All right, I will proceed with the thought I had before, since we have elucidated. What were you going to do with the other Gross unit while these towers were running?

A. Until the treatment proved satisfactory or did not prove satisfactory, nothing was to be done.

X Q. As I understand you, then, you and Mr. Welling advised Mr. Champlin to put in four Cross cracking units out of which Mr. Welling's company was to get the ten cents royalty and to try out a tower or as you have put it, two towers to one unit, and the other one would lie idle after you constructed it for him or the Kellogg Company constructed it?

Mr. Marsh: That is quite a long question.

The Court: He understands that.

A. You have said four Cross units. There are only two.

X Q. Well, substitute.

A. I don't know whether we suggested it lie idle or whether Mr. Champlin run that Cross unit and later treat that gasoline.

X Q. You sat back and heard Mr. Welling's testimony, didn't you?

A. Yes, I was here.

X Q. Weren't you listening to what he said about the conference that you and he and Champlin had?

A. Not particularly.

X Q. Weren't interested?

A. No, sir.

[fol. 655] X Q. Then, not referring then to Welling's testimony, because you were not interested—to protect you that far—I will ask you what you represented to Champlin with reference to what he would do with this idle unit after you got the initial installation in?

A. I made no reference.

X Q. And gave no advice about it?

A. No, sir, not at that time.

X Q. Then the effect of that would be, if Welling is correctly stating the conference, that you would put in sufficient treating capacity to cover one Cross unit, and the other one would be there idle or some other way would have afterwards been improvised after the experiment?

Mr. Hale: Just a minute. Pure argument.

The Court: Exclude it. That is a futile question.

Mr. McKeever: I will withdraw the question. I think it is only asking for his opinion anyhow.

X Q. Now, Mr. Keith, you knew on May the 13th that Champlin was getting rather busy about his inquiry about vapor phase towers, didn't you, along about that time?

A. That he was getting busy?

X Q. Yes, to find out about the towers, what would be done about them?

A. All I know is that he telephoned me from Enid on or about that date.

X Q. Did you come to Enid?

A. I don't think so, no, sir.

X Q. When did you finally get to Enid after May the 13th?

A. I think it was May the 27th.

X Q. Now when you got to Enid that day you learned that Champlin had been wiring to Gasoline Products Company about the towers, didn't you?

A. No, sir, I don't think so.

X Q. Anyhow you came there at whose suggestion?

A. I have forgotten whether at Mr. Champlin's suggestion or whether I came there at my own instigation, or whether our construction company, the Kellogg Company's superintendent, wired me. I have forgotten.

[fol. 656] X Q. Do you have any recollection about Welling wiring you?

A. I don't recall he having wired me, no, sir. That is May the 27th?

X Q. I mean that brought your visit that you say was made the 27th?

A. Yes.

X Q. There is in evidence here a wire from Mr. Champlin, May the 13th, admitted by both parties: "Wire definite information when we can expect complete plans and specifications of vapor phase treating towers"; and on May 14th is the reply to Champlin Refining Company: "Keith expected here Monday. Will wire regarding towers after discussion with him." Signed "Gasoline Products Company." Now, can you connect those wires with your visit to Enid, you say, May the 25th?

A. May the 27th.

X Q. May the 27th?

A. No, sir.

X Q. Do you recall whether you had any discussion with Welling of the Gasoline Products Company?

A. I don't think I did discuss it with him.

X Q. Did you appear in New York on Monday following that, as suggested in that telegram?

A. I got to New York about May the 17th.

X Q. But you did not have any discussion?

A. With Mr. Welling?

X Q. Yes?

A. No, sir.

X Q. Did you have any discussion with anybody else connected with the Gasoline Products Company on that visit to New York?

A. Not that I recall; no, sir.

X Q. You say you were there on the 17th? When did you get home?

A. I don't recall. Must have been about the 20th of May or something like that.

X Q. While you were in New York did anybody instruct you to go down to Champlin's refinery when you got home?

A. I don't think so.

X Q. You did go down though, after you got back, didn't you?

A. On or around May the 27th I think I went down, yes. [fol. 657] X Q. I have your telegram here, not offered in evidence, which will assist you in your date. I will just have it marked as an exhibit——

Mr. Marsh: We will stipulate he was there on May 26th, if that will help you.

Mr. McKeever: That won't help me a bit.

(Telegram marked "Defendant's Exhibit 70".)

X Q. Handing you "Defendant's Exhibit 70",—you sent that telegram?

A. Yes, sir.

Mr. McKeever: I read it to the jury. "Kansas City, Missouri, May 25, 1926. P. E. Slater, Champlin Refining Company, Enid, Oklahoma. Retel"—What does that mean?

A. Regarding your telegram.

Mr. McKeever (Reading): "Arriving Enid five thirty Wednesday morning. P. C. Keith, Jr."

X Q. That was after you came back from New York?

A. Yes, sir.

X Q. And you do not connect that visit in any way with any instructions that you had in New York from the Gasoline Products Company?

A. Not that I recall; no, sir.

X Q. Do I understand you to say that you went to New York and was there on the 17th of May and nobody called your attention to this telegram I have just read from Mr. Welling on the 14th day of May sent to the Champlin Refining Company from the Gasoline Products Company?

A. No, sir.

X Q. Did they call your attention to the telegram of May the 13th from Champlin to the Gasoline Products Company while you were in New York?

A. No, sir. I didn't see the Gasoline Products Company.

X Q. Were you there on a Monday following May the 14th?

A. I don't know whether it was Monday or not. I was there about the 17th of May.

X Q. When you got down to Enid you found considerable turmoil in the Champlin organization because nobody had started on the Cross towers, didn't you?

[fol. 658] Mr. Marsh: We are getting into this long-winded, double-barreled business again.

The Court: Characterizing it as "turmoil" gives him a chance to say he don't think it is a turmoil and so on and so on. If the witness would answer a little bit more frankly and candid, and if the counsel would be careful not to use any argument in his question and put simply direct questions, we would get along very much better.

By Mr. McKeever:

X Q. Let's agree with the Judge on that, Mr. Keith, and I believe we can. When you got to Enid on that occasion, Champlin complained to you that nobody was constructing the Cross towers in connection with his Cross cracking plant, didn't he? In substance that?

A. No, sir; I don't recall that.

X Q. Was anything said to you at all about Mr. Champlin claiming that the towers should be commenced to get

them completed by the time the cracking plant was done?

A. No, sir. As I recall the conversation it had to do mainly with Mr. Glasser's visit to New York.

X Q. Then you didn't on that occasion try to offer any suggestion as to how they would get ready to treat the gasoline after the Cross cracking units were up?

A. Whether I made the suggestion or somebody else, this was done. It was decided in that conference that I should go to Kansas City and make up drawings and estimates covering the cost of the Cross vapor phase treating tower and submit that to Mr. Champlin before he made a final decision.

X Q. The purpose of that was to have a treater by the time the cracker was done, wasn't it?

A. I think so.

X Q. Now, why was it necessary for you to submit that back to Champlin?

A. Because Mr. Champlin, as I understood it, had not yet made up his mind whether or not he would go ahead with the Cross vapor phase treater and defy Gray, or whether he should put in the Gray tower.

[fol. 659] X Q. The fact of the matter was that he knew nothing about either one of them, the construction of it, only what you and Welling and Harvison had told him?

A. I don't know about that.

X Q. You brought Schofield down there?

A. Yes, sir.

X Q. He was down there on the 12th?

A. I think that was the date.

X Q. You were at Enid on the first of February?

A. Yes, sir.

X Q. And you came back again with Schofield on the 12th of February?

A. I made one visit in between before I came back with Schofield on the 12th.

X Q. Will you state briefly to the jury—I think this is a frank question—why you brought Schofield down there and presented him to Champlin?

A. Mr. Champlin at a conversation we had had on February 6th told me that Tom Gray had stated that he would sue Champlin if he put in this Cross vapor phase treater. He had apparently made a considerable impression on Mr.

Champlin on the strength of his patent. I asked Mr. Schofield to come down in an effort to convince Mr. Champlin that if he went ahead with the Cross vapor phase treating tower that in our opinion if a patent suit were brought Mr. Champlin wouldn't be harmed by that patent suit from Gray.

XQ. You also got the impression from the row that Gray and Harvison had that there would be trouble, too, didn't you; in the hotel that day?

A. I don't know about that, Mr. McKeever.

XQ. That didn't impress you so much?

A. It impressed me; but there were other things to the row.

XQ. I know that. You hadn't got Champlin to put his signature on the contracts, had you?

A. On February the sixth?

XQ. Yes?

A. No, sir.

XQ. So when you brought Schofield back on the 12th it was after the row between Harvison and Tom Gray in the hotel, and at a time when you were perturbed with reference to the result of your sale to Champlin, wasn't it?

A. Yes, sir.

[fol. 660] XQ. Now, just this: I will ask you if you didn't state, out at the refinery in the presence of Mr. Phil Slater, or anyone, and after the conversation had arisen as to whether or not Champlin had a contract for the Cross vapor phase treater, you stated that you knew Mr. Champlin did have a contract and you were going to see that the Gasoline Products Company lived up to it?

A. No, sir. I didn't. I don't think I ever made that statement.

XQ. Did you at that plant, on the next visit after the sixth of February, in a conversation with Ernie Slater, say that Mr. Champlin had—that you had closed the deal with Mr. Champlin for the cracking units, and he was to get in connection therewith the Cross vapor phase treater?

A. I don't think I even saw Ernest Slater on my next visit to Enid after February sixth.

XQ. Well, I didn't—Did you see him—Did you say that to him on any of those visits after the sale of the crackers?

A. I don't recall that I did.

X Q. I will ask you, Mr. Keith, if in June or July, 1926, you didn't say, in conversation with Ernie Slater, that you were going to see that the Champlin Refining Company got the Cross vapor phase treater as originally planned; that that old man—meaning Mr. Champlin—had been a father to you, and they wasn't going to make a goat out of you?

A. I don't recall that conversation at all.

X Q. Now, when the controversy arose about giving the Champlin Refining Company the Cross vapor phase treater, did Mr. Champlin ask you about your authority?

Mr. Marsh: I would like to have him place that by time.

Mr. McKeever: Oh, along in the month of June or July. I can't fix it any closer than that.

A. Say that again please.

(Question repeated.)

A. I don't believe that he did.

X Q. You don't recall that?

A. No, sir.

[fol. 661] X Q. I will ask you if it is not a fact that Mr. Champlin asked you if you had any authority from the Gasoline Products Company to give this vapor phase treater, royalty free?

A. I don't think so, for this reason——

X Q. Well, I am not asking you for the reason. I am asking you if you had that conversation?

A. Well, at what time?

X Q. After the controversy arose as to whether he was going to get it or not?

A. No, sir. I don't think so.

Mr. McKeever: If the Court please, I am almost through with this witness. I want to ask one of the witnesses a question before I am finally finished.

(Confers with another witness.)

Mr. McKeever: I believe that is all, Your Honor.

Mr. Marsh: No re-direct.

The Court: No re-direct? Then the witness is excused.

(Witness excused.)

Mr. Marsh: We have now completed our case, except for one question that I wanted to ask Mr. Leverton in connection with the tabulation of this overhead expense.

The Court: Put him on and ask him what you want to. Call Mr. Leverton.

Mr. Hale: Continuing our cross-examination on direct?

The Court: Yes.

Mr. McKeever: Yes. We have no objection. We have the computation ready and it may be identified. The only thing we disagree on is the application of it.

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G. E. Leverton, recalled by Mr. Marsh, testified as follows, being a continuation of cross-examination.

By Mr. Marsh:

XQ. Mr. Leverton, I hand you this exhibit which is marked—(Plaintiff's Exhibit No. U Marked).

XQ. (Continued): —marked "Plaintiff's Exhibit U," and ask you whether you have prepared that?

A. I have.

[fol. 662] XQ. Will you state very briefly what that schedule indicates or what it relates to?

A. As is typed at the heading: "Fixed and Overhead, or indirect, Expenses, of Champlin Refining Company's Cross Chacking Plant, which continued and accrued whether plant was operated or not." That is made up, necessarily, from the best information that I have here available in Portland. And in the computation of the expenses, such as general expense, salaries, sales expense, and refinery overhead, I have computed those on the basis of outside—of the maximum figures, rather, I should say. May I make one more statement?

XQ. Yes. Certainly. Go ahead.

A. The item upon which depreciation has been figured, so far as general equipment—which is office furniture and fixtures and general automobiles—and that is all—is made from the basis of the item of depreciation on refinery equipment that was used—that which was used by both plants, is based upon appraisal figures of the American Appraisal Company.

X Q. Were those the same figures that you used in your other computation on depreciation?

A. The same rates, but of course these items weren't included in the other computation.

X Q. In connection with the depreciation on the cracking plant, you used what there? The cost price?

A. The contract price. The same figure as was in the other.

X Q. About that item of general expense: The total item, as I understand it, is $9,025 a month?

A. Yes, sir.

X Q. And you divided that up according to the four general classifications, of which one is refining and sales. Is any portion of that item attributable to the cracking plant——

A. I included with that refinery overhead and sales. Yes.

X Q. Would it be proper to divide that according to the allocation and take fifteen per cent——

A. That is the way it is ultimately done at the bottom of the page, Mr. Marsh.

X Q. Oh, that is included in this?

A. Yes, sir.

X Q. So you have included in the total at the bottom of the page a proportionment both of the general expenses and [fol. 663] the refining expenses, according to the amount of oil run to the skimming plant and to the cracking plant?

A. Yes. And in addition to the items on the upper part of the table is included the items of taxes, insurance and depreciation upon the cracking plant only.

X Q. Well, will you state what this tabulation shows as allocated to the cracking plant. The total for these items allocated to the cracking plant from the 20th of September, 1926, to completion of treating plant?

A. The total overhead and indirect expenses amounts to $16,300.18; taxes on the cracking plant, $2,416.66; insurance on the cracking plant, $2,013.85; cracking plant depreciation $41,586.77. Total for the cracking plant $62,317.46.

X Q. Thank you?

A. You asked me if I had used the same figures in this schedule that was in the original schedule with reference to depreciation, and I said it was the same rates. I should qualify that by saying that it is rates derived from the same

source, but not the same rates, for the reason that the rate on furniture and fixtures, as approved by the Income Tax Unit, was ten per cent; on the skimming plant and the general equipment of the refinery twelve per cent; and on the cracking plant it was twenty-five.

X Q. But as to the cracking plant you used the same rate of depreciation?

A. Yes.

X Q. That I was concerned with?

A. Yes, sir.

Mr. Marsh: I will not offer in evidence the table, marked Plaintiff's Exhibit "U". I don't think I have yet introduced that exhibit, although it has been marked.

The Court: Admitted.

Redirect examination.

By Mr. McKeever:

Q. Now, Mr. Leverton, to make this clear, as I understand it, when you made the calculations the other day, as to the expense of operating the cracking plant, and in making your allocation of these expenses, you only included such [fol. 664] expenses in our computation which would be added to the general expense of running the refinery?

A. That's right. The original computation didn't include these expenses and only included the expenses that would have been necessary in addition to these.

Q. Yes. These expenses you would have had whether you had the cracking plant in or not?

A. We did have.

Q. You did have, as a matter of fact?

A. That is all.

(Witness excused.)

Mr. Marsh: We rest.

The Court: Any rebuttal?

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REBUTTAL FOR DEFENDANTS

The Court: On account of the fact that this witness has an important engagement in New York, I have agreed to

run somewhat after the usual hour of adjournment, to get through, but they have agreed on their part to be very expeditious. That is the fortunate thing about it.

FRED C. KOCH, recalled for the defendants, testified:

Direct examination resumed.

By Mr. Glasser:

Q. Now for the identification of the record, Mr. Koch, will you state that you are the Fred C. Koch who has heretofore testified in the case?

A. Yes, sir; I am.

Q. Referring to the date of January 27, 1926, I will ask you to state as briefly as you can just what occurred at Enid upon that day in connection with your personal appearance there?

A. I don't remember exactly when I arrived in Enid, but I think it was the night previous, and I had spent that morning with Mr. Marnard who represented the Garber Corporation in trying to sell a Jenkins unit to the Champlin people.

The Court: You are not going to repeat what he testified to first?

[fol. 665] Mr. Glasser: This is only important as bearing upon Mr. Welling's testimony in connection——

The Court: Of course you can only use this in rebuttal. You can't go over his previous testimony.

Q. This only refers now to Mr. Welling's testimony.

A. And it was only in the afternoon——

Q. Eliminate anything now that was previously testified to.

The Court: Yes.

Q. And confine the matter.

A. I had left with Mr. Marnard and that afternoon I went out to the Champlin plant to see P. E. Slater about some towers which we had installed in that plant.

Q. Did you see Mr. Welling and Mr. Keith there at that time?

A. Yes, sir; they were in the dining-room of the hotel.

Q. At what time?

A. At noon.

Q. Had you seen them previous to that?

A. No, sir.

Q. Where did you immediately go after seeing Welling and Keith?

A. Well, within a half an hour I went out to the plant.

Q. Whom did you talk with at the plant?

A. P. E. Slater

Q. What was the subject of the conversation?

A. Well, he was asking me about the Jenkins units and the Cross units, and what my opinion of them was, and I told him that, and he said—I asked what his was. He said he preferred the Cross unit but the cost was excessive, and inasmuch as he had been very kind to us in our first starting onto business why I told him—it dawned on me then that I might be in a position to help him, and I told him, "Well, Mr. Slater, I might be able to give you a license from my old boss in England, my old employer."

The Court: You have been all over that once.

Mr. Glasser: I think not, Judge, in connection with time.

The Court: Ask him about time. Certainly he should not repeat his testimony about that offer or whether they used his license.

Mr. Glasser: Of course on the former testimony the element of time as to when that proposition was first made by [fol. 666] Mr. Koch was not material, but now it is very material. It is only for the purpose of identifying the time of Koch's first conversation about the deGanahl matter.

The Court: He has already given us the story. Leave that out.

Mr. Glasser: I am merely asking for the subject of the conversation. I want to fix the time.

A. It was that afternoon. I think I left there about four o'clock in the afternoon.

Q. About what time in the afternoon did you have the very first talk with Phil Slater about the deGanahl license?

A. It must have been about 2.30.

Q. How long did you talk with him?

A. Oh, I was there until four, I guess.

Q. At the refinery?

A. Yes, sir.

Q. Where did you go from the refinery?

A. I went back to the hotel.
Q. Did you see anyone else?
A. I don't think so. I don't remember.
Q. Where did you first go?
A. Went back to Wichita.
Q. On that evening?
A. Yes, sir.
Q. When did you get to Wichita?
A. Midnight.
Q. What did you do after you got to Wichita?
A. I think the next morning I sent the cable to England for the necessary authority.
Q. Did you get a reply from that cable?
A. I did.

(Produced and marked Defendant's Exhibit No. 71.)

Mr Marsh: This whole detail is about the same thing——
Mr. Glasser: No, the original cable.
Mr. Marsh: You didn't put it in?
Mr. Glasser: No.
Mr. Marsh: No objection to that at all.

Q. You identify it briefly, please?
A. Yes, sir; that is the cable.
[fol. 667] Q. The original?
A. The original.
Q. We desire to offer the exhibit in evidence.
A. That is the answer to my cable.

By the Court:

Q. The answer to his?
A. Yes.

Mr. Glasser: Yes.

Q. Reading it and omitting all of the formal parts: Dated Jan 29 PM 30 CLT Fred Koch Care Koch and Winkler Wichita Kans Thanks information Gray stop Will agree grant four thousand barrels under my license dividing royalty and construction profits with you as suggested your wire stop My American contract carries nine cent royalty do (due) gasoline Products or lowest rate given others stop Expect get petrol porduction thirty five

gallons daily through unit Hence construction new unit deferred Ganahl.

Q. Will you identify that word "petrol"?

A. That is the English term for gasoline.

Q. Could you identify it to the jury?

A. That is the answer to my cable.

Q. That word "petrol"?

The Court: What we call gasoline?

A. Yes, sir.

Q. When were you next in Enid?

A. The next I was in Enid was February the 2nd.

Q. How do you fix that date?

A. By the hotel register at the Hotel Oxford.

Q. Now whom did you see upon that occasion and when and where?

A. I saw Mr. P. E. Slater and Mr. Champlin that morning in my room in the Hotel Oxford.

Q. What was the conversation?

Mr. Hale: Now if Your Honor please, I can't see this is rebuttal of anything.

The Court: What does it rebut?

Mr. Glasser: It rebuts testimony that has been offered by the plaintiff with reference to Mr. Welling's discussion with [fol. 668] Mr. Champlin about this deGanahl matter, and Mr. Harvison—no, not Mr. Harvison. Mr. Welling and Mr. Keith.

The Court: You may go ahead, but be careful and not simply repeat.

(Counsel confer with the Court at the bench.)

Q. I will ask you the specific question when was the first time that you had any conversation with Mr. Champlin and Mr. Slater concerning the deGanahl license?

A. The first time I had any conversation with Mr. Champlin was on February the 2nd. The first time I had any conversation with Mr. Slater was on January the 27th in the afternoon.

The Court: The date of that cable was what?

Mr. Glasser: January 29th.

By the Court:

Q. Was that received by you the same day or the next day?

A. No, sir; I sent my cable on the 28th and I received that reply on the 29th.

Q. This is the 29th day, at Wichita, Kansas. Received from England on the 29th. Now I believe you stated that that was the occasion of the first talk with Mr. Champlin on February 2nd?

A. Yes, sir.

Q. Without regard to what was said——

A. Yes, sir.

Mr. Glasser: Now I understand the ruling of the Court, what might have been said in that conversation was not material on rebuttal?

The Court: No. This has been all gone over once.

Q. You are familiar, I believe, with the Cross cracking plant that was actually installed at the Champlin plant?

A. Yes, sir; I probably might not know the details, but in a general way.

Q. Know what it is and how it functions?

A. Yes.

Q. Wherein did the Cross cracking plant which you proposed to sell Champlin differ in any respect from that actually constructed by the Kellogg Company?

A. Well, in the physical construction of it there was practically no difference, as far as I know.

[fol. 669] Q. As far as you know?

A. Yes, sir.

Q. Has your experience been mostly theoretical and laboratorical or has it been practical and in the actual construction?

A. Well, it has been practical, practically all of it.

Q. I wish to ask some questions particularly referring to certain methods of handling the situation that developed in the Champlin Refinery subsequent to September 16, 1926, and in your answers to these questions I will ask that as briefly as you may you give your answers in a language and in a method the jury will understand.

A. Yes, sir.

Q. Assuming now, I question you with reference to what has been termed the first method proposed by Dr. Cross,

that is a method by which the treated cracked—method by which treating cracked gasoline with the doctor and mixing with the straight run for sale on the market, will you indicate to the jury the difficulties with that method as outlined by Dr. Cross?

A. Yes, sir. The Champlin straight run gasoline was a very superior product. It was very clear and had a nice odor. It probably had the color of a glass of water. The cracked gasoline which comes from the Cross unit is a yellow product, has a yellow cast to it, and has a very foul odor. The treatment suggested by Dr. Cross was caustic and doctoring. This materially improves the odor somewhat but not to any material extent, and it does not remove the compounds which are later going to cause a further discoloration and a further action with the air and cause it to go off color in the visible gasoline bowls which you often see. You probably all have seen the yellow stains inside of a gasoline bowl, and that is caused by those compounds which are not removed by this doctor treatment. In the event that this cracked gasoline had been treated in this manner and had been mixed with this fine straight run gasoline, it would have made a very inferior product, and would undoubtedly cause bitter complaints from his customers.

Q. Dr. Cross has stated that Champlin could have taken his raw cracked gasoline, treated it with the doctor solution, [fol. 670] mixed the resulting product with his straight run gasoline and sold the mixture. What would have been the consequence of his doing this?

A. Well——

Mr. Marsh: About what consequence? Confine it to something he knows about. He isn't qualified in that.

The Court: I don't know what he has in his mind. I don't know whether he means chemical consequences or business consequences.

Mr. Glasser: More particularly with this witness chemical conesquences.

The Court: He may answer.

A. Instead of having gasoline the color of this water which is seen in the glass which would remain that color, you would have one that would be a yellow cast and would gradually get worse and worse, become darker and darker, and would also precipitate a gum or a resin in the bottom

of the bowl, and it might cause gumming in the carburetor and require the user of the gasoline to clear the carburetors more.

Q. Are you acquainted with the plant of the Globe Oil and Refining Company at Blackwell, Oklahoma?

A. Yes, sir; I am.

Q. To what extent?

A. Well, I have done considerable construction work there. I know all the personnel.

Q. Were you acquainted with the plant of the Globe Oil and Refining Company at the time of the controversy here, in 1926 and 1927?

A. Yes, sir; I was.

Q. Now I will ask you if to your knowledge the Globe Oil and Refining Company have ever resorted to this method of handling their product?

A. No, sir; they have not.

Q. Are yau acquainted with the plant of the Simms Oil Company at Dallas, Texas?

A. Yes, sir; I am.

Q. Under what name was that plant formerly operated?

A. The Clayton Oil and Refining Company.

Q. Were you acquainted with it when it was operated as the Clayton Oil and Refining Company?

A. Yes, sir.

[fol. 671] Q. Were you acquainted with the plant during the period of time in controversy here, 1926 and 1927?

A. In a general way; yes, sir.

Q. Did the Simms Oil Company, what was then the Clayton Oil & Refining Company, ever practice the procses that has been indicated?

A. Yes, sir.

Q. Are you acquainted with the consequences of that practice on their part?

A. I am.

Q. Detail them to the jury, please?

A. They had considerable trouble with their customers on both the gum and gasoline going off color.

Q. Now, with reference to the second method proposed by Dr. Cross, as I understand Dr. Cross's proposal it was that the Champlin Company acid-treat its cracked gasoline and mix this treated product with the crude, run the mixture

through the skimming unit, or to use it as reflux in the crude distillation? Am I correct in my statement of his proposal?

A. Yes, sir.

Q. What would have been the result of the use of this proposal as to the gasoline?

A. It would have caused the gasoline to go off color.

Q. To what extent?

A. It is very difficult to figure to get it quantitatively, but it would have probably dropped appreciably enough to lower its market value.

Q. What would have been the result to the kerosene?

A. It would have materially impaired its color and burning qualities in a lamp, kerosene lamp.

Q. For what reason chemically, and why?

A. Why, the acid treatment of the pressure distillate creates some sulphonites, some complicated chemical compounds, which burn with a smoky flame, and if this pressure treated cracked gasoline had been mixed with the crude in that manner, these chemical compounds would have found their way into the kerosene, so that its color would have grown darker and it would have burned in a lamp, as I said before, with a smoky flame.

[fol. 672] Q. What percentage, Mr. Koch, in your opinion would be kerosene as compared with the gasoline production in volume of the crude that was then being run through the Champlin plant at capacity?

A. The Champlin people usually make about eight per cent of volume of the crude into kerosene.

Q. So that eight per cent of the volume would be affected by the process?

A. That is right.

Q. Now what in your opinion would be a fair percentage of loss that would be involved as concerning that eight per cent, if you are able to estimate it?

A. If they were unable to sell this kerosene as a kerosene by that treatment, they would have to dispose of it either as gas oil or burner distillate to use for household heating. It would lower its value materially.

Q. How long and at what cost would it have taken Champlin to install the necessary acid-treating equipment to carry out the second method proposed by Dr. Cross?

A. It probably would have taken at least three months, and it would probably cost from twelve to fifteen thousand dollars.

Q. Now with reference to the so-called third method, called the liquid phase treater, I will ask you if you are familiar with the so-called liquid phase treating as it is practiced at the Simms plant in Dallas, Texas?

A. Yes, sir, in a general way.

Q. As it has been practiced?

A. Yes.

Q. Are you also familiar wtih the so-called liquid phase treating practiced at the Globe Oil & Refining Company at Blackwell, Oklahoma?

A. In a general way. I have never examined that one installation, but I have this one at Dallas.

Q. Is this so-called liquid phase system used much at either place or both places? If not, why not?

A. I don't think it is, for this reason: The loss in treatment is quite high. It raises the end point of the gasoline in the treatment, and it is not a very suitable product. The gum doesn't sink as low as it should be.

Q. Did you say it raised the end point or lowered it?

A. It raises the end point, increases it.

[fol. 673] Q. That lowers the value of the product?

A. It cuts down your ultimate recovery of gasoline. If you are going to make 437 end point gasoline, you would have to begin probably with 415 or 420.

Q. Now have you personally supplied equipment to replace this system at the Simms plant at Dallas?

A. We have supplied re-run equipment so that they will have or are going to re-run this gasoline treated by this method, which defeats the purpose of the liquid phase treatment.

Q. I will ask you the same question with reference to the equipment in use by the Globe Oil & Refining Company at Blackwell, Oklahoma.

A. Well, we are supplying them with a continuous acid-treater to do away with this liquid phase treater, and also the re-run equipment.

Q. I will also ask the same question about the Bartels & McGuire plant at East Chicago, Illinois. Am I correct? Is it East Chicago, Illinois, or Indiana?

A. Indiana. This was an identical system with that of Dr. Cross, and we supplied re-run equipment for them to re-run that material, but I don't think the doctor had anything to do with the Bartels & McGuire installation.

Q. How long and at what cost would it require normally to install such a system, that would have been of sufficient capacity to take care of the Champlin situation as it existed in 1926?

A. It would probably cost twelve thousand dollars and require there or four months to install.

Q. With reference to the fourth process, called the Gray process, I will ask you to state, if you know, as to the royalty that was involved in the Gray process?

A. Yes, sir; six cents a barrel of gasoline.

Q. Are you acquainted with the Gray process?

A. In a general way, yes.

Q. How long would have been required to install such a system?

A. That would depend entirely upon the material which the boiler shops have on hand. The Gray towers are quite [fol. 674] large, and there is a dished head that enters into the construction of them, and these heads are not carried in stock very often by most boiler shops. They have to get them from the steel mills, and the steel mills manufacture them only at certain intervals, and, if the boiler shop in question does not have them in stock, and it does not happen to coincide with the time when the mill is making them, the delivery is apt to be very long, and it might require four or five or even six months.

Q. Would an eight-foot by twelve-foot tower been sufficient for Champlin's use?

A. No, sir.

Q. What in your opinion would have been of sufficient capacity to have handled the situation?

A. The towers Mr. Champlin has now are eleven feet in diameter and seventeen feet high. The pressure drop through those towers and through his condensing system at the present time is 40 pounds. If he had an eight-foot tower, it would be very much greater than that.

Q. Dr. Cross proposed a fifth method, in which, as I understood it, he proposed to use the Cross unit to re-run the acid-treated pressure distillate. Am I correct in that?

A. Yes, sir.

Q. Would this have required the installation of an acid-treating plant?

A. Yes, just as in the second method.

Q. How long would it have taken and at what cost?

A. Three or four months at least, and would have cost twelve or fifteen thousand dollars.

Q. Is the Cross unit, referring to the Cross cracking unit, adaptable to this operation? If not, why not?

A. No, sir. Well, in the first place, it has this reaction chamber on it in which there is considerable radiation loss, so that you must consider that you are heating a delicate stock and you must not keep it under heat or temperature any longer than is absolutely necessary, because you want to get your product out at the lowest possible temperature and as quickly as possible. The chamber defeats this purpose, because you have to heat your product hotter to overcome the temperature loss in the chamber. And also the [fol. 675] time element enters into it. Then this unit is not designed for this operation, and you must inevitably leave considerable gasoline in your pressure distillate box. Then also I doubt very much whether the condensers on a Cross unit are of ample capacity to take care of this. For instance, they are designed for 650 barrels of gasoline, and, if, as the doctor said, it would run 1400 barrels of pressure distillate, the reflux ratio would amount to 700 barrels per day on that; so there would be practically 2000 barrels which these condensers would have to handle; in other words, over three times as much as they were designed for, which is much greater than could be expected of them.

Mr. Glasser: You may cross examine.

Mr. Marsh: We could not obviously cross examine this witness, either Mr. Hale or myself, without being advised by my experts. I don't know what it is all about. I have got to be able to consult with them. I think there are several questions I shall want to ask him. I know of several. If we could have a recess of a few minutes, we could still, I think, keep within the time.

The Court: Will ten minutes do?

Mr. Marsh: I think so.

Mr. Hale: Our cross examination won't be very long. If we have lunch and get back by two o'clock, he can get the train all right.

The Court: We will recess until one o'clock standard time.

(Recess.)

Afternoon Session (May 1, 1929)

The Court came in at one o'clock P. M., eastern standard time, and the taking of testimony proceeded as follows:

(Fred C. Koch on the stand.)

Cross-examination.

By Mr. Marsh:

Mr. Marsh: I hope that Your Honor and the jury will bear with me in these questions I am going to ask. I have [fol. 676] the same difficulty in asking technical questions about which I am personally very little informed.

X Q. Mr. Koch, in answer to the questions that I am now going to ask you I want you to assume that the cracked gasoline has been sweetened by the doctor solution. I will try to put that in my questions, but if I do not will you please make that assumption?

A. Yes, sir.

X Q. Will you state what experience you have had in mixing Cross unfinished end point gasoline, sweetened with doctor solution, made from Champlin gas oil in the proportion of 1-5 with Champlin straight run gasoline?

A. I have never done it.

X Q. What experience have you had in blending any Cross cracked unfinished gasoline treated with the doctor solution in the proportion of 1-5 with straight run?

A. Do you want to limit that to the 1-5?

X Q. One to five?

A. I can't specifically answer that I have made any in that proportion.

X Q. In what respects is Mr. Champlin's straight run gasoline superlative in the sense that has been testified to here?

A. It is made from those northern Oklahoma crudes which have very low sulphur content, and Mr. Champlin is always very particular to give the customer a light gasoline for what he buys. The color is good.

X Q. The color is one of the features?

A. Yes, sir; and low sulphur.

X Q. And what with reference to gum?

A. The straight run gasoline would have a very low gum.

X Q. What is what you refer to as no-knock or anti-detonating value of this straight run gasoline as compared to Cross cracked gasoline made from the same crudes?

A. Well, this gasoline would probably run zero, and the cracked gasoline would probably run 25 to 30 per cent benzol equivalent.

X Q. Which is the better gasoline from the point of view of no-knock or anti-detonating effect,—the straight run or the cracked gasoline?

A. The cracked gasoline.

[fol. 677] X Q. Will the Champlin straight run gasoline operate a motor, that is, an automobile motor, more efficiently than the Cross cracked gasoline sweetened with the doctor?

Mr. Glasser: I object to that for the reason it is not proper cross examination on the matters that were inquired into on rebuttal.

The Court: We haven't adhered to that rule strictly: I will let him answer.

Mr. Marsh: It has a very direct bearing, Your Honor.

A. In some respects the one would be better and in others the other would be better.

By Mr. Marsh:

X Q. State which one would be better and with reference to which features?

A. The cracked gasoline having a higher benzol equivalent would burn in the engine better.

X Q. That is the anti-knock?

A. Yes; and would give more power; but the straight run gasoline would not deposit any gum in the carburetor which might be the effect with the other.

X Q. Would the deposit of gum in the carburetor be affected by the method in which the cracked gasoline had been treated?

A. Yes.

X Q. In what respect would the Cross unfinished end point gasoline, 410 end point, sweetened with the doctor, fail to meet U. S. motor specifications?

A. From what source would this be made?

X Q. From the crudes that Mr. Champlin is now using that have been referred to in the testimony?

A. I don't know that I can answer that.

X Q. You have no opinion on that?

A. No.

X Q. Have you any knowledge as to what the U. S. specifications are?

A. Well, I don't know that I know every particular, but in a general way I do.

X Q. I will show you on page 386 of the Handbook of Petroleum, Asphalt and Natural Gas Bulletin No. 25, Kan-
[fol. 678] sas City Testing Laboratories, a statement on page 386 of the specifications of U. S. motor gasoline, and ask you to examine it?

(Witness examines same.)

(Question read.)

By Mr. Marsh:

X Q. Having in mind the specifications that you have now before you what would be your answer?

A. I still say that I don't know.

X Q. Will you state whether, having in mind these specifications which you have just read, the blended gasoline described by Dr. Cross, that is, Cross cracked gasoline sweetened to the doctor, one part to five parts of Champlin natural straight run gasoline, would that gasoline, that blended gasoline, meet those U. S. specifications?

A. I wouldn't be in a position to answer that either.

X Q. Can you say and, if so, will you say, whether Mr. Champlin's present straight run gasoline meets these requirements?

A. Yes, sir.

X Q. How about the sulphur content?

A. Yes, sir.

X Q. What is the sulphur content of the present straight run gasoline?

A. I expect it would be .01 per cent.

X Q. What are the points that you don't know about these specifications when you make these answers? What is it that causes you to say that you don't know?

A. If you will describe how you are operating the Cross unit. You have to fix your conditions more definite.

X Q. I said operating to the 410 end point gasoline and then treating with the doctor solution?

A. Will you fix the intermediates for me?

X Q. You have got me there. Are you familiar with the Cross fractionating towers; those applied to the Cross cracking units?

A. Yes, sir.

X Q. Can't you state what the intermediates would be using that fractionating?

A. You would have to tell me what stock you were putting through there.

[fol. 679] X Q. The same stock?

A. And at what temperature you were cracking?

X Q. The ordinary cracking temperatures such as are used in Mr. Champlin's operations to-day?

A. It might be and it might not be.

X Q. It might come within the specifications and it might not?

A. It might not.

X Q. And if it did not what would be the points in the specifications that that did not comply with?

A. It might not comply with the intermediates.

X Q. But you don't know that definitely?

A. No, sir.

X Q. When you have stated that that Champlin straight run gasoline manufactured from these Mid-Continent crudes, that the sulphur content would be about one-tenth of one per cent, was that based on your actual knowledge?

A. Well, in a general way. I know the sulphur content in those northern Oklahoma crudes is very low, and that none of the refiners who refine these crudes are ever bothered with sulphur.

X Q. Now, assuming in this same question that I have asked you that the intermediate fractions did in fact comply with the U. S. specifications,—I believe that is what Mr. Slater testified,—that they did,—what would your answer be, first, as to the blended gasoline, and second as to the Champlin straight run gasoline?

A. To what question?

X Q. As to whether they would comply with the U. S. specifications?

A. You mean whether the gasoline from the Cross unit would?

X Q. Yes; either the gasoline from the Cross cracking unit, sweetened to the doctor, or the blended 1 to 5 of that gasoline with the present Champlin straight run?

A. Yes; I think it would so far as those points go there; but you appreciate that the gasoline can comply with those specifications and not be marketable.

X Q. I didn't ask you that. What experience have you actually had in endeavoring to market that type of gasoline that I have described,—this blended gasoline?

A. I have had some.

[fol. 680] X Q. Where?

A. In England.

X Q. I am going to take that up a little bit later. Have you in this Country?

A. I don't believe I have. Principally because the laboratory test showed otherwise.

X Q. Now, with reference to the matter of color, will you please state what color the Champlin cracked gasoline, made from these crudes that we have been referring to, sweetened with the doctor, would make,—what Saybolt color?

A. Well, it would probably not be constant. It would vary between certain limits.

X Q. Let's have the limits?

A. It would also vary depending upon what end point products you were making.

X Q. Manufacturing to the 410 end point?

A. I would say that it would vary between 15 and 20 Saybolt.

X Q. Would that vary if you used constant conditions in running your cracking unit?

A. Well, not if you used absolutely constant conditions; but that is impossible.

X Q. I mean constant conditions within the bounds of ordinary refinery practice?

A. Yes, sir; they do.

X Q. What percentage of it would run under 18 per cent, we will say?

A. What portion of what?

X Q. What portion of the output? You say it varies. I am trying to reach what in your opinion would run at a color less than 18?

A. Under what conditions?

X Q. I am assuming normal operating conditions, running these crudes to a 410 end point?

A. Well, if it was 18 in color, one hundred per cent of it would run 18 color. If it were 19 color, it would be different again; 17 would be different again.

X Q. The greater part of it would run 17 or better, would it not?

A. Oh, yes.

X Q. Are you familiar with the U. S. motor specifications, as to color?

A. No, sir; I am not.

X Q. Now I will refer to the same page of this handbook and ask you to state whether or not that refreshes your recollection?

A. Its color was formerly 16.

[fol. 681] X Q. Now, what color is that? What color would that be? White, yellow, green or brown?

A. Well, it would have a yellowish cast. It is very hard to say just what the exact color would be.

X Q. I am asking you what color it would be in the trade description of color?

A. That would be a prime white.

X Q. What range in the Saybolt test is covered by the description of prime white?

A. Prime white ranges from twenty to about fifteen, I believe. I am not positive of that.

X Q. Can you state, definitely, what causes the discoloration that appears in this cracked gasoline made by these—or from these—crudes and sweetened to the "doctor"?

A. There are a number of unsaturated hydrocarbons which are formed in any cracking operation. These chemical compounds, by virtue of their nature are essentially unstable. They are hooked on to each other, they polymerize and go to dark, boiling, highly colored bodies, that they may be exposed to the air to form condensation products. And——

X Q. Well, Mr. Koch, is there anybody living who knows just what those reactions are?

A. No. I don't think so.

X Q. No. You simply know the results? Isn't that correct?

A. Yes. That is correct, yes. In a general way.

X Q. You don't know how or why that happens?

A. Well, yes. They can isolate the particular—or a particular—unsaturated hydrocarbon. But when you come to take a sample of gasoline which contains several hundred chemical compounds it is difficult; very difficult.

X Q. That is why it is difficult?

A. Yes. That is why it is so difficult to prognosticate what happens on treating.

X Q. Are there any unsaturates present that is treated by the Gray process?

A. Yes.

X Q. What is the color of them?

A. Well, if the treatment is at the early part of the stage it would probably be thirty. It depends on the condition of the clay and on its operation, too. It might be lower.

[fol. 682] X Q. Now, Mr. Koch, does that color of the Gray treated gasoline remain fairly stable?

A. What do you mean by "fairly stable"?

X Q. I mean commercially stable?

A. Fairly so. Not too good.

X Q. How low a color would be reached on exposure?

A. I think—I have seen it go fourteen or fifteen.

X Q. How long after its manufacture would that be?

A. It depends whether it was in the sunlight or in dark storage or light storage. It is subject to too many variables.

X Q. What was your connection, if any, with the Globe Oil & Refining Company at Blackwell, Oklahoma, in 1926?

A. Well, I made several visits there.

X Q. Did you have any contractual relations with them?

A. No, sir. I didn't.

X Q. Can you state, of your own knowledge, in 1926, whether the Globe Oil & Refining Company mixed their cracked gasoline with their straight run gasoline?

A. I was advised by their General Manager that they didn't.

X Q. You don't know that of your own knowledge?

A. I wasn't present there at that time. I discussed the general treating problems with them a number of times since then.

X Q. Referring still to the Globe Oil & Refining Company; what did the Globe Company do with its cracked gasoline that it was producing in 1926?

A. I really couldn't say. I think they treated it in the laboratory part of 1926 by the liquid treater.

X Q. Do you know what type of charging stock the Globe Company was using in 1926?

A. I think it was crude from Burbank and south Kansas.

X Q. Isn't it a fact that they were using fuel oil?

A. For the Cross unit?

X Q. Yes?

A. Yes, they were using fuel.

X Q. What would fuel oil—Would fuel oil make a better or poorer gasoline than gas oil, taken from the same crude?

[fol. 683] A. This word "fuel oil" in that instance is more or less of a misnomer, because there was a fuel oil pipe still connected with this Cross unit.

X Q. Can you state, of your own knowledge, whether some gasoline was cracked directly from the fuel oil charging stock?

A. No, sir. I cannot.

X Q. Can you state whether gasoline produced from a fuel oil would have a larger sulphur content than a cracked gasoline produced from gas oil made from the same crude?

A. Well, I think that is open to some discussion. In general it would. Yes, sir. But there might be some exceptions to it.

X Q. Well, the probability is that from the point of view of color and so forth, the gasoline made from fuel oil would be inferior to the gasoline made from the gas oil?

A. I rather think so. Yes, sir.

X Q. What contractual relations did you have with the Simms Company?

A. At what time?

X Q. In 1926?

A. None.

X Q. Have you had some since that time?

A. Yes, sir.

X Q. Can you state when the Simms Company installed its first liquid phase treating plant? Cross liquid phase treating plant?

A. It was either—I think it was in 1924.

X Q. That is right? Is that plant *not* still in operation?

A. Well, it may be, but they are not producing a finished gasoline from it. Or they do not intend to do so, in the future.

X Q. Can you state when the Simms Company installed the liquid phase treater at its Smackover plant?

A. I believe they did at the time the refinery was put in operation.

X Q. Can you state when that was?

A. Well, that was in 1927.

X Q. Some three years after their plant had been installed and was still in operation, was it not?

A. Yes, sir.

X Q. What type of crude were they going to use in that Smackover plant, having particular reference to sulphur?

A. Well, it would be rather high.

[fol. 684] X Q. It was a very high sulphur, wasn't it?

A. Yes.

X Q. And yet they were going to put in the Cross liquid phase treater at their plant?

A. Yes, sir.

X Q. Now, in your direct testimony you referred to a relatively high loss involved in the operation of the Cross liquid phase treater at the Simms plant in Dallas; will you state specifically where that loss occurred?

A. Well, it was in the sludge from the acid. And also from evaporation loss and also by virtue of the end point being raised; it was cut down considerably.

X Q. Could you apportion that loss on a percentage basis?

A. I think so. Fairly closely.

X Q. Well, will you do so, if you can?

A. I imagine the yields of gasoline were cut down by ten per cent by virtue of this——

X Q. Well, can you allocate that ten per cent to these different causes which you have mentioned, Mr. Koch?

A. I am speaking only by volume of the gasoline.

X Q. Yes. For instance, the loss in the sludge?

A. The end point would be ten per cent by itself. That is a complete loss, you understand. That means there is that much loss in the gasoline production per day.

X Q. Now can you allocate that ten per cent to the use of the clay?

A. I think it would probably run four per cent by the sludge loss and probably two per cent evaporation loss.

X Q. And then the sludge loss involves the loss from the use of the acid?

A. Yes, sir; and the clay.

X Q. Now, is it probably or possible—I will ask you each way—that the high rate of loss at the Simms liquid phase treating plant was occasioned by improper absorption equipment and handling a gasoline containing a large equivalent of non-condensible gas?

A. Do you mean absorbing that Cross gasoline and putting it in this system? Yes. I have been informed of that.

X Q. And they use gasoline containing considerable non-condensible gas? That is, based on the crude that they were then running?

A. Well, no more so than a number of other people.

[fol. 685] X Q. Supposing that the gasoline that they were charging into that liquid phase treating plant had been stabilized before passing through the treating plant; wouldn't that have greatly lowered that loss?

A. The evaporation loss. Yes, sir. It would.

X Q. Would it have lowered some of the other elements of loss, as well?

A. Well, there is some question. If there are more unsaturates in the latter ends. But the percentage of the gas to the head——

The Court: You will have to close that window. We can't hear what the witness is saying. The reporter can't hear him.

X Q. Well, it is a fact, is it not, that the liquid phase treatment improves the color?

A. Temporarily, yes.

X Q. Can you state how much?

A. I believe they get up to twenty-five.

X Q. How many points improvement on the Saybolt scale?

A. That is quite variable. It depends on how much color you start with, among other things, and how much acid you use, and so forth.

X Q. Well, then the operation they are using down there? The operation that they are actually using down there?

A. I believe they come from about eighteen to twenty-five.

X Q. Around seven points?

A. Yes, sir.

X Q. And it may be more than that? Is that so?

A. It might be, and it might be less.

X Q. Can you state, in your own language, whether the Simms Company sells its Cross cracked gasoline at a premium? That is, what has been treated through this liquid phase treater?

A. I believe they do, a portion of it. From the Smackover. I don't think they do from Dallas, by virtue of the character of the crude at Smackover.

X Q. Can you name any customer of the Simms Company that is having this difficulty that you spoke of with the Cross cracked gasoline treated in the liquid phase treater?

A. No. I can't specifically recall any particular customer at this time. No, sir.

[fol. 686] X Q. Now, going to these proposed methods of handling the Champlin cracked gasoline, that were discussed by Dr. Cross and then commented on by you in your direct; referring to what was called the third method of acid-treating and re-running gasoline through the crude stills; I will ask you this: How much kerosene is contained in the Cross unfinished, 437 end point, gasoline?

A. Before acid treatment, or after?

X Q. Before. Before the acid treatment?

A. Well, there is none before.

X Q. How much would there be after the acid treatment?

A. It would depend on the strength of the acid treatments. It would depend on the nature of the charging stock. I should say generally, as the fractions would run, 6% by volume of the gasoline.

X Q. They make from their straight run about 1120 barrels—1100 barrels of kerosene a day?

A. Somewhere in that neighborhood.

X Q. Applying that percentage of 6% to it, how much in volume would that mean it would affect it?

A. Well, it wouldn't—it isn't a very large factor as regards volume. You must remember the color of the gas oil fractions, polymerized fractions, is very bad, and it would take a very small matter to throw the color off a great deal.

X Q. Going back to the quantity, how much would it be to affect the——

A. Around 60 or 70 barrels, something like that.

X Q. A day?

A. Yes, sir.

X Q. What is that worth?

A. Well, it is worth six cents.

X Q. Six cents a gallon?

A. Yes. Seven cents.

X Q. What is a barrel worth, two dollars and a half?

A. Somewheres there.

X Q. Now have you ever re-run acid treated Cross cracked end point gasoline in the manner described that was made from these Champlin crudes?

A. No. I can't say I performed that identical operation. [fol. 687.] X Q. Can you state of your own knowledge as to whether the Standard Oil Company of Indiana isn't using this practice in re-running their unfinished cracked gasoline?

A. No, I don't know——

X Q. You don't know about that?

A. How they treat it.

X Q. How do they treat Champlin gasoline under present practice?

A. How do they treat it?

X Q. Do you know how they treat it?

A. I am not familiar with their exact treatment. I don't know whether they give it acid treatment or not.

X Q. If it was acid treated, how would that affect the color of it?

A. Improve it.

X Q. Wouldn't that have the same effect on the gasoline that Dr. Cross described in his first method, in connection with the kerosene you testified to yesterday?

A. Oh, no, sir.

X Q. You spoke of pressure drop through the treating tower. Will you state whether the internal design of a tower would affect the pressure drop through the tower?

A. Oh, yes. There can be any number of factors affect it.

X Q. Would the mesh of clay affect it?

A. Yes, sir; very considerably.

X Q. Can you state what mesh of clay Mr. Champlin is using in his treating tower?

A. 30-60.

Q. Thirty——

A. Sixty.

X Q. And the clay would affect the pressure drop?

A. Oh, yes.

X Q. If you had a finer clay——

A. It would be more.

X Q. Would be more, more resistance?

A. Yes.

X Q. Did you ever measure the proportion of the pressure drop caused by the condenser as compared with that caused by the tower itself? You testified as to the confined pressure drop.

A. Yes.

X Q. Have you ever attempted to segregate that and say what part of the pressure drop was due to the re-
[fol. 688] sistance in the tower and what part to the resistance in the condenser?

A. No, sir; I haven't.

X Q. Isn't it probable that most of that drop is caused from the condenser rather than in the tower?

A. Well, a part of it undoubtedly is. How much I don't know.

X Q. Is there piping in——

A. I don't think there is much drop to the piping. I think it probably would be three-quarters to the condenser and the remainder to the piping.

X Q. Now if the pressure was caused by the condenser or that proportion of it, could not that have been remedied by placing the condensers in parallel?

A. Yes, you might as well rebuild your condenser box.

X Q. How much would it cost?

A. It might cost a good deal.

X Q. I mean how much?

A. Oh, you might have to have an entirely new box.

X Q. How much would it cost?

A. To have a new box and new condenser coils and a new acid cooler, it might easily cost $10,000.

X Q. If you didn't have to have a new box and could do it without that, how much would it cost?

A. There are so many elements entering into it, you have got to fix them. I can't tell you what anything would cost.

X Q. I had better not press that because I don't know anything about it myself. Can you state whether the reaction chamber of the Cross cracking unit is insulated?

A. Yes, sir.

X Q. How thick, do you know?

A. My recollection is it is four or five inches.

X Q. I think that is right. What is the percentage of the total heat passing into the reaction chamber that would be lost by radiation?

A. Well, I am unable to give you that, without some calculation.

X Q. Would it be large or small?

A. Well, it would be—it all depends on what you call large or small. The normal amount of the total; no, sir.

[fol. 689] X Q. Take it if it was 900 degrees, would it drop 5 degrees or 10 degrees or 20 degrees?

A. That would depend on how much you are putting through there. The more you put through the more it would drop, and the less you put through the less it would drop.

X Q. Assume you put through 1500 barrels a day?

A. I imagine it would drop 40 or 50 degrees.

X Q. Is that of your own knowledge, have you ever tried that?

A. No, I haven't tried it; no, sir.

X Q. That is just an estimate?

A. That is an estimate.

X Q. Would it be less with gasoline than with the gas oil? I mean using—be less when you re-run gasoline, less temperature drop?

A. Less actual number of B. T. U.'s loss per hour because the reaction chamber would be hotter with the gas oil.

X Q. You wouldn't need to run it so hot re-running the gasoline?

A. No, sir.

ERNEST J. SLATER, recalled for the defendant, testified as follows:

Direct examination.

By Mr. McKeever:

Q. Mr. Slater, you are the same Mr. Slater who has testified heretofore in this case?

A. Yes, sir.

Q. And are you the now present superintendent of the refinery?

A. Yes, sir.

Q. I will ask you if you have made any investigation as the superintendent of the refinery with reference to the sulphur content of that product you manufacture?

A. Yes, sir.

Q. Does the Champlin gasoline pass the sulphur test?

A. The straight run or the cracked gas?

Q. You tell us about it, either one?

A. Either one of them. Either one.

Q. Has there ever been a time when it would not?

A. No.

Q. With reference to the color of the gasoline manufactured by you, what is the color?

A. 30.

[fol. 690] Q. Has your refinery ever sold any gasoline less in color than 25?

A. No; we have always sold at above 25.

Q. Now Dr. Cross in his testimony intimated that in one method he was going to provide as a temporary means for you to minimize this damage, I take it,—he said you could pick up machinery or material around your refinery to do one of those things. Do you remember his testimony on that?

A. Yes, but we have no such stuff as that laying around the refinery.

Q. Did you have in 1926 when this dilemma was on?

A. No.

Q. What do you say about the re-run equipment and the other equipment that he testified might be pressed into service?

A. We would have had to have put all that stuff in, because the equipment that we had was in use.

Q. All in use?

A. Yes, sir.

Q. Now you are making the straight run?

A. Yes, straight run and lubricating oils.

Q. Do you understand that testimony with reference to one of his processes as to the effect it would have on the kerosene content?

A. Yes. In my opinion that would seriously affect the kerosene.

Q. What would it do to it?

A. Put it off color and make it bad odor and ruin the burning test.

Q. What would it do with reference to the marketability?

A. It would not be marketable as kerosene. I doubt whether you could market it as kerosene.

Q. I think Dr. Cross admitted there in one place that one of these methods he was suggesting, that might have been resorted to, would have to do with cutting down the consumption of your crude stock. Now was there over a time, during that period, that that could have been done?

A. Well, we have always had all the crude we could run. Our connections were such that we had to keep running the crude.

Q. Explain that to the jury, about your connections being such that you had to run it?

A. Well, we have contracts for a certain amount of crude that is delivered to the refinery each day, and that crude oil has to be taken care of daily.

[fol. 691] Q. Under those contracts there are one or two things that can be done with that crude oil, one of them run it and the other store it?

A. One of them run it, and the other store it.

Q. But it has to be disposed of?

A. Oh, yes.

Q. Was there any proposition, or, to make it general, was there any proposition suggested in detail by Dr. Cross, suggested by him as a temporary way of getting away from the shut-down of the refinery, that could have been installed in any less time than you could put in a tower?

A. I don't think so.

Q. I mean by putting in a tower—putting in the vapor phase.

A. Vapor phase filter tower.

Q. Filter towers and system?

A. Yes.

Q. Did you have any conversation with Mr. P. C. Keith—I can't fix the exact date, but when you first learned that Champlin had purchased the Cross cracking units?

A. Yes, sir.

Q. Whereabouts?

A. Down at the refinery.

Q. What was that conversation?

A. Mr. Keith come down there and says to me, "Well, Ernie, we have sold them a Cross unit to make a finished gasoline right direct from the Cross unit." I said, "A vapor phase filter tower goes in there with it?" He says, "Yes."

Q. Did you have any subsequent conversation with him? You heard me in detail ask him to-day about the one where he said he was trying to make him the goat? I am only saying that to refresh your recollection and fix the conversation.

A. Yes, sir, I did have a conversation of that kind with Mr. Keith. We were standing in the back of the laboratory, talking, and I says to Keith, I says, "Keith, what in hell is the matter they don't get this vapor phase filter tower put in here?" He said, "You never mind, we are going to put them vapor phase filter towers in there just as it was originally planned," he says, "Mr. Champlin has always been like a father to me and they are not going to make any goat of me."

The Court: Any what?

The Witness: Any goat.

(Cross examination waived.)

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[fol. 692] Mr. McKeever: I have got a few questions I want to ask Mr. Leverton, if you will just give me a little time to get them together. He has got them written out here. Maybe that will help me.

G. E. Leverton, recalled for the defendant, testified as follows:

Direct examination.

By Mr. McKeever:

Q. As I understand it, Mr. Leverton, you promised to produce three schedules in typewritten form that you have testified to heretofore?

A. Yes.

Mr. McKeever: I now hand the reporter the three schedules and ask him to mark them as Defendant's Exhibits in the proper numerical order.

(Documents marked Defendant's Exhibits 72, 73, and 74.)

I now introduce 72, 73, and 74 for the record, as to heretofore agreed to and promised. I am not sure but that Your Honor asked that you might see these.

The Court: I don't know what they are.

Mr. McKeever: They are just those short computations, as he testified when on the stand previously. I will leave them on your desk for the present.

In order to advise the jury now what is being done, may I be permitted to refer to these briefly.

Mr. McKeever then read the schedules to the jury as follows:

DEFENDANT'S EXHIBIT No. 72

"Computation of Depreciation on Contract Price of Cross Cracking Plant during period it was shut down (Mar. 24 to Oct. 8, 1927) for re-running and treating gasoline manufactured during the period before the treating plant was completed.

| | |
|---|---|
| Contract price of Cracking Plant | $413,000.00 |
| Depreciation rate allowed by Income Tax Unit of U. S. Treasury Department on this plant | 25% |
| [fol. 693] Depreciation per year | 103,250.00 |
| Depreciation for month | 8,604.16 |
| Depreciation from Mar. 24 to Oct. 8, 1927 (6½ months) | 55,927.04." |

DEFENDANT'S EXHIBIT No. 73

"Computation of cost of chlorine treatment of gasoline to be produced by Cross Cracking plant during its life at rate established by experience of Champlin Refining Company.

| | |
|---|---|
| Guaranteed yield of 65% of rated capacity of 54,000 barrels per month is | 35,100 bbls. |
| Cost of Chlorine Treatment per barrel | .014984 |
| Cost of Chlorine Treatment per month | $525.94 |
| Estimated life of plant based upon 25% depreciation rate allowed by Income Tax Unit of U. S. Treas. Dept. | 48 months |
| Cost for 48 months | $25,245.12 |
| Discount of 20% for reduction to present value, contingencies, shutdowns, etc. (practice by Engineering Section, Income Tax Unit U. S. Treasury Department) | 5,049.02 |
| Net cost of Chlorine Treatment | $20,196.10." |

DEFENDANT'S EXHIBIT No. 74

"Computation of Interest on Contract Price of Cross Cracking Plant during period it was shut down (Mar. 24 to Oct. 8, 1927) for re-running and treating gasoline manufactured during period before Treating Plant was completed.

| | |
|---|---|
| Interest on $413,000 for 1 year at 6% | $24,780.00 |
| Interest on $413,000 for 1 month | 2,065.00 |
| Interest from Mar. 24, 1927, to October 8, 1927 (6½ mo.) | 13,422.50." |

[fol. 694] Mr. Marsh: Your Honor understands that all this goes in subject to the objection we made at the time when the oral testimony was put in?

The Court: Oh, yes.

Mr. McKeever: Yes; it is just merely to get it on paper for the record, the computations.

Mr. Marsh: Our exceptions as at that time may be reserved?

The Court: Yes. (Exception noted for plaintiff.)

By Mr. McKeever:

Q. I would like to have you now indicate, since Dr. Cross has had a graph here, or tell us, the months of the years 1921, 1922, 1923, 1924, and 1925, in which the gasoline prices reached the peak?

A. May I get another file, please?

The Court: Yes.

A. The gasoline price—this is on the basis of U. S. motor specifications, which is in conformance to the chart which has been introduced—in 1921 the year began on the down market, consequently the highest point in the year was naturally the first of the year, and January was the peak market for that year; and for 1922 the peak came in June; while in 1923, the highest price for the year came in February and March; for 1924 the highest price came in January and February; and for 1925 the highest price came in June.

Q. Now you introduced a graph, as we call it, in evidence for 1926?

A. Beginning with 1925.

Q. Now, did you read that clear through?

A. No; I read only the 1925.

Q. Connect it up with the one already introduced. Just take it on from there?

A. The one that I just read is the first year that was on the chart that was introduced; 1925.

Q. I will ask you this question: do you know the date on which the financing was completed that has been talked of here with reference to the bond issue?

A. The bonds were made available,—placed to our credit in the Chicago Bank, on February 25, 1926.

[fol. 695] Q. Where were you on February 26, 1926?

A. I was in Enid on the morning of February 26th, and in the afternoon, the best I can remember, around, I would say, two o'clock, may be 2.30, Mr. Champlin, Mr. Glasser, Mr. Cotton and myself drove to Tulsa in Mr. Champlin's automobile.

Q. Was that the 26th, the date on which Mr. Keith was there, that has been testified to, when the contracts were signed?

A. That is the same date. I don't remember seeing Mr. Keith myself.

Q. But the same day?

A. Yes, sir.

Q. Now, how long did you and Champlin and Glasser and Cotton stay over to Tulsa?

A. We stayed that night and until probably eight or nine o'clock the following night, and then drove back to Enid the next night.

Q. Whom did you meet at Tulsa?

A. We met Mr. Jameson——

Q. That is the Mr. Jameson that has been here to-day?

A. Yes, sir; here in the building; and Mr. Robert Jackson, and Dr. J. J. Deaner, Mr. C. F. Powell, and Mr. L. M. Carter.

Q. Now, what was the nature of your business on that date?

A. That was the matter——

Mr. Hale: I presume this is intended to be rebuttal?

The Court: Yes; it must be rebuttal. You asked him the nature of his business. I think you may go that far.

A. That was concerning the merger of the Champlin Refining Company and the Windsor Oil & Gas Company.

Q. And who were the owners of the Windsor Oil & Gas Company?

Mr. Hale: I do not understand the materiality of this.

The Court: Of course I do not.

Mr. McKeever: I wanted to show the connection the men had with it.

The Court: What is this in rebuttal of?

Mr. McKeever: Why Champlin went to Tulsa that day.

[fol. 696] The Court: What is the testimony that you say you want to rebut?

Mr. McKeever: Mr. Keith testified that Champlin went over there to see Thomas Gray.

The Court: What difference does it make who he was going over there to see?

Mr. McKeever: It makes a whole lot of difference in connection with Mr. Keith's testimony.

The Court: Did he say that on direct or cross examination?

Mr. McKeever: On direct.

The Court: Can you tell where that was in his testimony?

Mr. McKeever: I think it was yesterday.

The Court: See if you can find it.

Mr. McKeever: I will explain to the Court, if you please, why I am asking this.

The Court: It might not be permissible in the presence of the jury. It is just a question of whether Mr. Keith testified that Mr. Champlin told him——

Mr. McKeever: Not in the presence of the jury, may I explain to you?

The Court: Certainly.

(Confers with Court and Counsel at bench.)

Cross-examination.

By Mr. Marsh:

X Q. Are you familiar with the market demand and prices for low sulphur content crude oils in the fall and winter of 1926 in the Oklahoma district?

A. I don't believe I would say I am, Mr. Marsh.

X Q. What was the supply of crude oil that was flooding the market at that time,—a new supply,—do you know? Wasn't that the Pecos oil?

A. It is my opinion that was the Seminole. That is my offhand recollection.

[fol. 697] X Q. Can you state from your own knowledge whether there was any greater demand for oil with a low sulphur content than for oil with a high sulphur content?

A. No, sir; I couldn't say.

(Recess for ten minutes.)

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H. H. Champlin, recalled in rebuttal, testified:

By Mr. McKeever:

Q. The first question I want to ask the witness is to explain an answer he made the other day, and that is with reference to the time Mr. Schofield was at Enid, Mr. Champlin?

A. Well, my testimony at that time was a little erroneous, and it happened this way: when I testified in this case about a year ago I testified that Mr. Welling and Mr. Keith

came to Enid the latter part of January as I remember it, and that Mr. Keith and Mr. Schofield came a little later; and this time before I came to Portland I thought I had better confirm those dates as well as I could, so I sent my clerk to the hotel to find out the dates——

Mr. Hale: Just a minute!

The Court: You can say you have refreshed your recollection and testify so and so.

A. I want to say that I was probably wrong in saying that Mr. Schofield was in Enid February first, 1926, and quite likely that he was there as he testified.

Q. Now, I think he has got a right to say this: In fixing the time do you know now what element misled you before?

A. Yes. In trying to ascertain the correctness of the dates I sent my clerk to the hotel to see what dates these gentlemen were registered there, and my clerk reported to me that Mr. Keith and Mr. Schofield were registered there February first, and after Mr. Scofield took the stand here the other day I referred to the memoranda that I had and ascertained that the Schofield that was registered at the hotel February first was H. E. Schofield and not T. E. Schofield, and that is what led me into the error.

[fol. 698] Mr. Hale: We desire to stipulate that Mr. Champlin's previous testimony was made in entirely good faith.

The Court: No doubt. There is no question of that.

By Mr. McKeever:

Q. Now, Mr. Thomas Gray in his deposition has testified that on February the fifth he saw you in the hotel at Enid and showed the prints for his patent and that you wanted to keep them but that he took them back. Did he on that date show you these patent prints?

A. No.

Q. Did you ask him to keep any patent prints he had?

A. No.

Q. Mr. Keith testified that when he and Harvison called on you, which would be February the fifth or sixth, in discussing the Gray infringements or alleged infringements that Harvison said to you Gray was a primitive fellow and

that he would probably sue you if you built the Cross vapor phase towers. Now, did Harvison say that to you?

A. No.

Q. I will ask you if any one of the three, Welling, Keith or Harvison, during all the discussion concerning the infringement of this Gray patent told you that Gray would probably sue you?

A. No. The date ought to be fixed.

Q. I mean prior to May the first, 1926?

A. No.

Q. Prior to that date did either Keith, Welling or Harvison make any statements to you to discourage you from taking the Cross vapor phase treater on account of Gray's patent prior to May first, 1926?

A. No.

Q. Mr. Keith has testified that he saw you at Tulsa on February the 19th at which time you stated to him that your financing had not been completed, and that you told him that you didn't know whether you would put in a cracking plant at all that night; in substance that. Did you make that statement to Keith?

A. No.

Q. Do you know of your own knowledge what date the proceeds of your bond issue was passed to your credit?

A. Yes.

Q. What date?

A. February 25, 1926.

[fol. 699] Q. The money was actually deposited to your credit in the bank on that date?

A. Yes, sir; we received a wire from the bank in Chicago to that effect.

Q. Did you go to Tulsa on February the 26th, 1926?

A. Yes.

Q. Who went with you over there, Mr. Champlin?

A. Mr. Glasser, Mr. Cotton and Mr. Leverton.

Q. I will ask you if on February 26th, as you were leaving for Tulsa, you told Mr. Keith that you were going over there to have an appointment with Mr. Gray concerning these towers; I mean the treating system?

A. No, I did not.

Q. Did you have an appointment with somebody there that day?

A. Yes.

Q. Who was it?

Mr. Hale: That is irrelevant, if Your Honor please.

The Court: He may say whether it was Mr. Gray or not. Was it Mr. Gray?

A. No, sir.

By Mr. McKeever:

Q. Did you ever ask Mr. Keith if he had a letter of authority with reference to his right to sell the Cross vapor phase towers from the Gasoline Products Company?

A. Yes.

Q. About when was that?

A. I should say the latter part of May.

Q. 1926?

A. 1926.

Q. Did you ever see the letter of which this purports to be a copy, this "Exhibit L" that was offered by Welling?

A. I don't know what Exhibit L is?

Q. I hand you "Exhibit L" to refresh your memory as to what "Exhibit L" is, and after you examine it, then I want the question repeated.

(Witness examines "Exhibit L".)

(Question read.)

A. That refers to the original?

Q. Yes?

A. No; I never saw it.

[fol. 700] Q. Did anybody ever furnish you a copy of it?

A. The first copy I ever saw you furnished to me about a year ago, or I saw it in your files about a year ago.

Q. That was after we tried the case here before?

A. Yes; or at that time.

Mr. McKeever: To refresh the memory of the jury on what this "Exhibit L" is,—at the top it says "Cross Development Corporation, January 9, 1926, P. C. Keith, Esq., Cross Engineering Company, 700 Baltimore Avenue, Kansas City, Missouri. Dear Mr. Keith: Subject: Vapor Phase Treating. As you know, we are very anxious to secure at the earliest possible date an installation of our vapor phase treating process. To secure such an installation we

are prepared to give a free license, if the installation is made in connection with the Cross cracking process. This free license would, of course, apply only to the first installation made as we will expect on the basis of the results achieved to determine the appropriate license charge. We will issue a license to cover this installation which will follow in principle the language of the Gasoline Products Company license covering the Cross cracking process, and will include a provision in substantially the same language as paragraph 6 of the Gasoline Products Company license, in accordance with which we will undertake the defense of any suits instituted against the licensee for infringement. Very truly yours, blank Vice President, and initialed C. H. W." it being conceded that the same was signed "C. H. Welling," the Vice President.

Q. When you went to Tulsa on February the 26th, 1926, when did you return?

A. We left Tulsa about nine or ten o'clock the night of the 27th.

Q. What day of the week was that?

A. Saturday.

Q. Were you at home on Sunday the 28th?

A. Part of the day?

Q. Does your office open on Saturday?

A. No.

[fol. 701] Q. Now, did you ever ask Mr. Keith—I want to say that my question previous had no relation to the one I am asking; I got out of my line of thought. Did you ever ask Mr. Keith if he had a letter of authority with reference to this Cross vapor phase treating plant?

A. Yes.

Q. What did he say?

A. He said he did have.

Q. What did he say? Did he say who he had it from?

A. Yes.

Q. All right. What did he say?

A. He said that he had. I asked him the question myself first, shall I say what I asked him?

Q. Yes. State what he said?

A. Well, I had become——

The Court: You would better state what you said in relation to that authority?

A. I asked him about it. I asked him if he had authority from the Gasoline Products Company to sell me this vapor phase Cross treating plant, and he said he had. Then I said, "Is it in writing?" And he said it was.

Q. But he never showed you the letter?

A. No. I didn't ask him to see the letter, because I didn't think he had it with him anyway.

Q. Now, Mr. Welling testified that on January 27th, when he and Mr. Keith called on you, that he discussed with you the merits of this offer that Fred Koch had made to him. Did you have any conversation with Welling at all about Koch's offer?

A. No.

Q. I will ask you if at the time you talked with Mr. Welling and Mr. Keith, when Welling was present on that day, that you knew of Mr. Koch's offer?

A. No.

Q. You heard Dr. Cross's testimony with reference to the product by mixing these different products from your plant to make gasoline. I will ask you what would have been the result on your market if you had done that?

A. We would have had lots of trouble.

Q. Well, would you have done it?

A. No.

Q. Would you make and put on the market the kind of a gasoline that he described?

A. No.

[fol. 702] Q. Mr. Keith testified that you did discuss two vapor phase towers, but that two of them were to take care of one Cross unit. Mr. Welling testified that you only discussed one tower. Now, did you discuss the two towers with Mr. Keith, as he has stated here, to take care of just one unit of your plant?

A. No.

Q. I believe you testified in your direct examination what was said in that regard, Mr. Champlin, as I recall it?

A. Well, I don't remember.

Q. Well, I don't want to repeat it; it is rebuttal now. I am sure it is in the record. Now, there was considerable testimony on the part of Mr. Keith in the interim; I think I will be permitted by counsel on the other side to make this rather a blanket question to cover that period of time; and I will ask you now, Mr. Champlin, if subsequent to Feb-

ruary 6, 1926, you ever told Mr. Keith or Mr. Harvison or anybody else representing the plaintiff here, or any of the allied companies, that you hadn't decided to put in this vapor phase treater?

A. No.

Mr. McKeever: I believe that is all I want to ask you, Mr. Champlin.

Mr. Marsh: Just a minute.

Recross-examination.

By Mr. Hale:

XQ. Mr. Champlin, you testified that you would not put on the market the kind of gasoline that Dr. Roy Cross described in his testimony; and you referred, I presume, to the blend of straight run with cracked gasoline?

A. Yes.

XQ. Of course, prior to the installation of your cracking plant you had never sold anything but straight run gas, had you?

A. Yes.

XQ. You say you had sold something besides straight run gas?

A. No.

The Court: Did you say "sold" or "seen"?

Mr. Hale: Sold.

[fol. 703] A. We had never marketed anything but straight run gasoline up to that time.

XQ. And you were unwilling to depart from that policy?

A. Yes.

XQ. You knew that Mr. Schofield—you knew when he came to Enid that he was the attorney for the Cross Development Company, didn't you?

A. No.

XQ. Do you say now that you didn't know he was attorney for the Cross Development Company?

A. I knew he was attorney for the Crosses. I didn't know for sure whether he was attorney for the Cross Development or the Cross Engineering Company.

XQ. I call your attention, Mr. Champlin, to your testimony on page 88 of the record of the trial last year, on

examination by your own counsel, Mr. Glasser: You testified: "Mr. Schofield was the attorney for the Cross Development Company and he had examined all these patents, he told me, both the Gray patents and the foreign patents, and he said that there was no infringement by their patent upon the Gray patent." Do you recall that testimony?

A. No. I don't recall it.

X Q. You meant at that time you gave that testimony to tell the precise truth?

A. Yes.

X Q. And that was your recollection a year ago?

A. What?

X Q. I say, that was your recollection a year ago?

A. That was my recollection a year ago.

X Q. Your recollection a year ago was in accordance with the testimony which I have just read?

A. Well, I don't remember, but if that is what the record says it was evidently so. If I said he was attorney for the Development Company it was more or less a presumption, because I had no definite knowledge that he was.

Mr. Hale: I don't think there is anything further, Your Honor.

The Court: Did you say you were through?

Mr. Hale: Yes, sir.

The Court: Seems to be all.

[fol. 704] Mr. Marsh: We rest.

(Witness excused.)

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COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Hale: Plaintiff rests here, Your Honor.

The Court: Then the testimony is closed on both sides?

Mr. Hale: We would like to argue a motion to the Court.

The Court: I understand that counsel for one side desires to argue some questions of law to the Court; and I have arranged with them, in relation to their arguments, which necessarily will take up some considerable time to-morrow; and I have told them, gentlemen, that I think they ought to take time enough to analyze this case considerably, for the benefit of myself and yourselves, because it has necessarily

been very long and very technical and difficult for people living in this section of the country, unfamiliar with the oil business, to thoroughly comprehend. And the reason I mention that to you is because I think you ought to pay very careful attention to their arguments which will be based upon very careful study of the case. And I think it is hardly worth while to hear any portion of this argument to-night; no doubt they can make it more concisely if they wait until to-morrow morning before beginning, and so I will excuse you now until to-morrow morning at half past eight, and without doubt we shall be able to finish up the whole case by to-morrow night. You may be excused.

(Jury excused and retired.)

Mr. Hale: If your Honor please, I present a motion which I will read:

"Plaintiff's Motion for Directed Verdict

Now comes the Gasoline Products Company, Incorporated, Plaintiff in the foregoing cause, and moves this Honorable Court to direct a verdict in its behalf in the sum of $61,530.51, and for cause of said motion set forth:

1. That the defendant has confessed its indebtedness to the plaintiff in said amount.

2. That the defendant has failed to establish any claim or right of action by the defendant against the plaintiff.

By Its Attorneys," —— ——.

[fol. 705] and so forth. And we say that the amount in question is the stipulated amount. At the outset, I should like to call the Court's attention to what we regard as a total variance between the plaintiff's—what I would call, for the purposes of convenience—the declaration. And I call attention to the language. There are two counts in this declaration in set-off, first on an oral proposal made by the plaintiff through C. H. Welling, its vice president, during the month of January, 1926, at Enid, Oklahoma, to the defendant, duly accepted by the defendant by execution through its president, Champlin, of the other written contracts hereinbefore described, said last named proposal being for the installation of a Cross vapor phase system

treating tower. The indefinite article "a" means one, certainly. In the second count they declare upon the breach of the contract which the defendant alleges came into being on February sixth by Champlin's oral acceptance to Keith on that day of the written proposal. And the written proposal, which has been read over and over again, refers to the proposition covering the installation of a Cross vapor phase system treating tower. So that the only thing on which the defendant is declaring is a contract for one of these towers. And Mr. Champlin testified with the utmost vehemence that he wouldn't have accepted the contract for one tower and that no contract for one tower was ever made. It was a contract for three treating towers. Now, if that were merely a technical discrepancy between the proof and the pleadings, it would be one thing. But it goes to the root of this whole case, because it modifies the rights of the parties on substantive questions of law, and of course goes right to the whole question on damages. And we are unable to see how on that pleading this testimony of Champlin's establishes any case at all on this counterclaim.

Now the other aspects of the case are very much as they were when the case was tried a year ago in respect to the plaintiff's testimony which has not varied materially from the testimony at that time. Now Your Honor will of course have in mind the opinion of the Circuit Court of Appeals, [fol. 706] but the opinion comes merely to this; that the Court decided that with only the plaintiff's case before it and no other evidence, that the Court was confined—did in fact disagree with Your Honor's ruling that the jury might from the plaintiff's case alone have given a verdict for the plaintiff.

Now then this case rests on the uncorroborated testimony of Champlin and the testimony of Harvison, Welling and Keith on behalf of the plaintiff who testified to the negotiations also. The testimony of Schofield who testifies to a limited phase of the—perhaps I should not say negotiations, but the contract. Now all the testimony shows that this Cross treating system was the property of the Cross Development Corporation. It could have been offered to Champlin only by the Cross Development Corporation. Keith couldn't have been authorized by anybody else to sell

it, and he was in fact authorized by the Cross Development Corporation to sell it, and by nobody else. So that this suit is brought against, we say, the wrong party.

Now then we still are back to the fundamental question we faced a year ago, on acceptance. We will say there isn't any evidence of Champlin's acceptance of this contract. Of course any testimony about acceptance must come from Champlin, because there is no other witness on behalf of the Champlin Refining Company who professes to any knowledge of the dealings which led to the contract or absence of contract, except Champlin.

Champlin does not say that he accepted any offer on January 27th, as I understand it. He does not claim that he accepted any offer on February 6th, because he specifically says that he did not reach any final conclusion in this matter until after he had talked with Schofield about the patent situation. So that we are down to the meeting on February 26th before Mr. Champlin can make a contention as to acceptance. That has a single glimmer of merit, and on February 26th we are faced with the extraordinary circumstance that he accepted all those other contracts, that he did not profess to accept the offer in writing, he did not profess [fol. 707] at that time to accept orally the offer for, as we say, a treating tower; and as he says, three treating towers, and three days after the February 26th meeting when he signed the three contracts that he unquestionably signed, he sends Keith a letter February 28th: Dear Mr. Keith: Our bonds went over so there is nothing to prevent going ahead with—what? The cracking still. Not one word about a treater.

Now I am not talking about Champlin's own testimony. We put our witnesses into the case, and certainly are entitled—the numbers are three to one, and as a matter of inherent credibility, I think they are entitled to just as much respect as Champlin. They talk about financial interests in this case. Certainly they have not any more financial interests than Champlin. Our witnesses, Harvison and Welling, all say that they did not even know of this written proposal until six or seven months later, in the summer of 1926, and all the testimony shows these negotiations and discussions as to the type, and Champlin even sent Glasser on to New York in May to discuss the patent situation

about which he apparently was concerned. He had not even got all the data from Schofield about the patent until way along in the summer, and Champlin's own testimony— I want to call your Honor's attention to this on Page 101 of the record: "Well, Keith came several times between May and July, probably in June, and he began talking to me about the inadvisability of going ahead and putting in that Cross vapor phase treater, because it was doubtful whether it was going to be a success or not. He wanted me to change over and take some other process. In June, I think it was in June, he invited us to go to Simms Refinery in Dallas, Texas, and examine a Cross liquid phase treater, and I sent our superintendent down there with him." Now for Heaven's sake, if he had this contract and was relying on the contract, why in the world did he send his superintendent down to Dallas to look at another plant?

"Then Mr. Keith tried to sell me a Gray vapor phase treating tower which carried a royalty of six cents a barrel, [fol. 708] and I wouldn't accept that." The imputation of the testimony is that he would not accept it on account of the royalty, not on account of any pre-existing contract. "And all the time he kept saying to me, 'Go ahead, and we will put in the Cross vapor phase treater, but it is doubtful whether it will perform as we said it would.' And I tried to get him to say that they would put it in, or would not," and he said he would put it in, and it would not perform like he said it would.

And I call Your Honor's attention to these words, which speak volumes, spoken by Champlin: "but he never would tell me that he would not put it in." He was complaining about uncertainty, and I think the testimony taken as a whole, it is only fair the inference which we say must be put upon it, that there was a proposal, a written proposal, for one treating tower. All the proposals were the same, which was never accepted by Mr. Champlin, and I now come to the estimate of damages, and we still say, as there is no evidence of any damage suffered by the defendants in this case, even on the assumption that there was a contract, and that our client broke it, and that question was argued in the Circuit Court of Appeals and is not touched upon in the opinion of the Circuit Court of Appeals no doubt quite rightly. I am not attempting to criticize the Court, but I

say that that question is still a burning question with this Court at this time, and that point, it seems to me, is almost too obvious for argument. Here was a treating process which everybody knew to be completely untried, completely experimental, and never been anywhere, as I said to the jury, on land or sea, outside of Dr. Cross's laboratory, and the measure of damages, if I understand the fundamental law of damages is to put the defendant back into the same position that he would have been if he had had what his contract gave him a right to expect, assuming there was a contract. It was a contract which gave him the right to except that he should have three treating towers, as we say three, and they say one. Now where would he have been if he had not? Who knows. Dr. Cross—there isn't a word of testimony, there wasn't any attempt to tell Mr. Champlin [fol. 709] what the thing would do commercially. We told him what it would do chemically, told him that the vapors would go up through the clay and so on, but it is perfectly clear that the only knowledge that anybody pretended to have when the offer was made was the knowledge about the chemical functioning of this apparatus, and along in May they knew they were not going to get the apparatus and Champlin says he believed that they were not going to get the apparatus, and still Champlin says that in May they knew that they could not furnish a treater that would work commercially, and Champlin believed it very reasonably, had no reason to disbelieve it, and still he would make no contract for anything else. In June the Kansas City Structural Steel Company sent the drawings I think prepared by Mr. Mitchell who testified for the Champlin Refining Company. All that came to Champlin. He did nothing about it. He would not accept the drawings. He did not project, and the situation drifted on until Champlin suffered inconvenience, damage perhaps, and there was no damage which was attributable to the breach of this alleged contract. Mr. Champlin does not get up and say "If I had had this Cross vapor phase treater I would be so and so many dollars better off to-day." All they rely on is a letter of counsel written March 20th, I think it is, at any rate in March, 1925, which professed to give figures only for the cracking process, and is expressly so limited in its language, and they certainly cannot rely on that to show damage for a treating process.

Mr. Marsh calls my attention to the fact that I have not said anything about the alternative methods of treating. I have not entered on that, because I have thought that perhaps that went more to the question for the jury, and of course I am only talking to Your Honor about the vital points in the case. I do not see how there can be anything in the case of the Champlin Refining Company against us.

The Court: Mr. McKeever, what is your theory about the meeting of the minds of the parties to perfect the contract touching the treating towers?

[fol. 710] Mr. McKeever: Of course, the testimony shows, and it has always been our claim, that when they sold him the Cross cracking units they, of course, sold him the treating towers. Now the minds had to meet, of course, to make a contract; I appreciate that, and it is our contention that after the negotiations that have been testified to—and Mr. Champlin so testified—on the date that Keith and Harvison left his office or his presence to go and make the contract, when they were there submitting to him the proposition, that is, on the fifth or sixth, we will say, of February, no matter which date, the one or the other, all of them agree that they went off to make those contracts, and that they had made him the proposition that if he would buy the Cross cracking units, they would install, royalty-free, the vapor phase treating tower, and he told them he would take it.

His evidence on that, while in the other trial it was a little vague, because he referred to it as a plant, it is my recollection——

The Court: Well, when did he tell them he would take it?

Mr. McKeever: He told them on the sixth of February, 1926, or the fifth. The hour that they came down there I thought there was some confusion about, whether it was on the fifth; they got there on the fifth, but on the sixth of February, when they came there, Keith and Harvison, after all the negotiations, after Welling had been there, then he told them—and that is his evidence—after they told him they would give him them they would give him the vapor phase system royalty-free with the Cross cracking units—he told them he would take it.

The Court: I want to get at your theory rather than the evidence. Your theory is then that the minds of the parties met on the fifth or sixth?

Mr. McKeever: Yes.

The Court: Your theory is that they met on the matter of the treater before they met on the matter of the cracking plant?

Mr. McKeever: No, no; they were simultaneous. I don't claim they had closed anything on the cracking plant up to that date.

[fol. 711] The Court: They didn't close the contract for the cracking plant until the 26th?

Mr. McKeever: No; but they left just one reservation on the sixth before it was to be signed up. He accepted it. Then it all depended on the question of his being able to finance his loan. That was all that was left open. It had no other contingency. As soon as the loan was completed, and he called Keith then, that eliminated that one reservation. So, the deal was then consummated. The minds of the parties met.

The Court: I wanted to get your theory as to when the minds of the parties did meet, as I have always been very uncertain in my mind, as a matter of law, when they met or if they met at all on the matter of the treater. Of course they met on the matter of the cracking plant, which was put in writing, and they met when the contracts were delivered.

Mr. McKeever: They met, our contention has been, at the same time. Not only that, if the Court please, but the evidence—Mr. Champlin's testimony and the many circumstances—has to do with it.

My attention is called to whether Your Honor understands that the Circuit Court made a finding with what we had before in relation to that. I am now trying to make my statement on just what we have got here this time, which is much stronger than what it was before. Because I undertook, perhaps, to develop it so that there could be no doubts in the mind of anybody, from my point of view, if they accepted Mr. Champlin's testimony, as to the meeting of the minds.

The Court: I wanted to get your theory about that, but, regardless of my own theory, of course I feel it my duty to

let the jury decide the case, especially after the opinion of the Circuit Court of Appeals, and so I will overrule or deny your motion, Mr. Hale, and allow you exceptions.

Mr. Hale: If Your Honor will allow us exceptions?

The Court: Yes.

[fol. 712] (Motion to direct a verdict for plaintiff denied. Exception noted for plaintiff.)

At the close of all the evidence and before the arguments, the defendant filed motion to amend its pleading, which motion was denied and exceptions seasonably taken and noted.

The Court: Unless there is something further, we will suspend until to-morrow morning at half-past eight.

(The trial was then suspended until 8.30 a. m., Thursday, May 2, 1929.)

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MEMORANDUM RE EXHIBITS

In order to prevent the undue extension of the record, the exhibits as read to the jury and printed above are not hereinafter reprinted.

Exhibits not appearing in the preceding pages are printed after the following index.

For the convenience of the Court we print the following:

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Defendant's Exhibits

DEFENDANT'S EXHIBIT No. 1

The M. W. Kellogg Co., Jersey City, N. J.

March 20, 1925.

Mr. P. E. Slater, Champlin Refining Co., Enid, Okla.

MY DEAR MR. SLATER: I am enclosing herewith typed information which I showed you in manuscript form last

Monday, I am also having the Laboratory send to you samples of materials obtained by cracking from the stocks which you forwarded to us. I have already given you the Kansas City Testing Laboratory reports on these materials, and by referring to the Laboratory number and to the number marked on the sample, you will be able to see what kind of material was obtained from each test.

I am still awaiting information from New York on the question of the towers which we discussed Monday afternoon. I will keep after them and try to get it to you as soon as possible.

Very truly yours, The M. W. Kellogg Company, by Guy N. Harcourt.

GNH—E

Note latest addition to list of licensees.

Financial Returns to be expected by the Champlin Refining Company from Cracking by the Cross Process, based on the installation of four 1,000 barrel units plus a Pipe Still for fuel oil.

[fol. 717] NOTE.—Prices are taken as of March 3, 1925:

| | |
|---|---|
| Gasoline | 12¢ per gal. |
| Fuel Oil 24-26 Gravity | $1.20 |
| Kerosene Distillate | 4½¢ |
| Gas Oil 32-36 gravity | .03½ |
| Fuel Oil 13-14 gravity | $1.10 |

Based on Indicated Yields

| | Gas oil | Kerosene dist. | Fuel oil |
|---|---|---|---|
| No. of Cross Units | 4 | 4 | 4 Pipe Still |
| Investment—Cracking Plant | $455,000 | $455,000 | $515,000 |
| Monthly Profit | $102,302 | $100,800 | $ 87,730 |
| Annual Profit | $1,228,000 | $1,210,000 | $1,053,000 |
| Annual Profit—% on Investment | 270 | 266 | 225 |
| Fresh Stock—Bbls. per mo. | 54,000 | 54,000 | 64,250 |
| Gasoline—bbls. per mo. | 40,770 | 46,400 | 37,800 |
| Fuel Oil—bbls. per mo. | 10,250 | 4,320 | 22,100 |

| | Gas oil | Kerosene dist. | Fuel oil |
|---|---|---|---|
| Profit per bbl. fresh stock | $1.89 | $1.87 | $1.36 |
| Profit per bbl. gasoline | $2.51 | $2.17 | $2.32 |
| Operating expense per mo. | $29,884 | $29,884 | $37,000 |
| Operating expense per bbl. Gasoline | $0.73 | $0.642 | $0.98 |
| Operating expense per bbl. Throughput | $0.277 | $0.27 | |
| Based on Guaranteed Yields | | | |
| No. of Cross Units | 4 | 4 | 4 Pipe Still |
| Investment—Cracking Plant | $455,000 | $455,000 | $515,000 |
| Monthly Profit | $ 77,965 | $ 75,766 | $ 59,330 |
| Annual Profit | $936,000 | $910,000 | $712,000 |
| Annual Profit—% on Investment | 206 | 200 | 138 |
| Fresh Stock—Bbls. per mo. | 54,000 | 54,000 | 68,500 |
| Gasoline—bbls. per mo. | 35,100 | 40,500 | 30,800 |
| Fuel Oil—bbls. per mo. | 13,500 | 8,100 | 30,800 |
| Profit per bbl. fresh stock | $1.45 | $1.405 | $0.866 |
| Profit per bbl. gasoline | $2.21 | $1.87 | $1.925 |
| Operating expense per mo. | $29,884 | $29,884 | $37,000 |
| Operating expense per bbl. gasoline | $ 0.852 | $ 0.737 | $ 1.20 |
| Operating expense per bbl. throughput | $ 0.277 | $ 0.277 | |

Sample 89642—Fuel Oil 26.5° Be'.

This sample was a typical Midcontinent Fuel Oil of high grade. We first ran a distillation without cracking, which showed the oil contained 15% of a gas oil and 60% of wax [fol. 718] distillate, the remainder being a soft residue. This distillation was made to determine the characteristics of the oil, and gas (instead of steam) was used throughout to prevent cracking. Subsequent to this distillation another sample was distilled with fire only and 80% was taken

overhead, leaving approximately a 12-13° Be′ fuel oil. The overhead was a 35.1° Be′ gas oil. In this last distillation the reduction in a pipe still was approximated as much as possible; however, pipe still reduction would give an even lighter overhead product as an appreciable quantity of naphtha is formed, since, due to higher temperature in the pipe still, more cracking will take place.

The overhead product was then used as charging stock for cracking. It was found that by recycling there would be produced from the 26.5 gravity fuel oil 58.8% gasoline, 34.4% fuel oil, with a total loss of 6.8.% The gasoline is of high gravity for cracked gasoline. The fuel oil, while heavy in gravity, is nonviscous and readily soluble, free from suspended carbon or B. S. and high in calorific value.

Sample 89643—Gas Oil 35.9° Be′.

This material is an exceilent charging stock except that it has a rather broad range of boiling points, containing 45% off at 572° F., which could be included in a kerosene cut. Removal of these lighter portions will improve the cracking qualities of the gas oil in practice. A sample of the gas oil was cracked direct and it was found that by recycling we could expect to convert 75.5% of the gas oil into gasoline, 19% would be fuel oil 16.5 gravity of excellent quality, and a 5.5% loss in coke and fixed gases.

Sample 89644—Kerosene Distillate.

This sample of kerosene distillate contained a considerable quantity of Naphtha (20%) boiling below 410° F. By good fractionation 20% of the distillate could be removed with the gasoline, while with the best fractionation, using properly designed and proportioned towers of the bubble cap type, 35% of the material could be recovered to add to the gasoline yield.

[fol. 719] Cracking tests were made on the material as recovered and on the distillate after 20% of naphtha had been removed, so that a comparison might be made.

Referring to the distillation of the kerosene distillate as received, the initial boiling point is seen to be 350°. After cracking the synthetic crude is seen to have an initial of 88°, while the end point has been raised. From this syn-

thetic crude 49.7% of gasoline may be removed as the result of a single cracking; by recycling the 42.8% of recycle stock an ultimate yield of 86% of gasoline may be expected.

The synthetic crude from cracking the kerosene distillate after 20% naphtha has been removed, shows an initial boiling point of 87° F. From this 45% of 437 E. P. gasoline may be removed after one cracking, so that by recycling the 45% of recycle stock an ultimate yield of 84% may be expected. By removing the naphtha from the distillate and including it with the gasoline 437° F. End Point is found to be 84%×80%=67.2+20%=87.2%.

The financial returns from processing the gas oil and kerosene distillate in the Cross plant direct, and the fuel oil in the Cross plant in conjunction with a pipe still will now be determined. Two methods of figuring will be used: first, with yields as shown by the tests; secondly, based on figures which we are prepared to guarantee. Figures are with complete recycling.

### Gas Oil

| | Test results | Guaranteed results |
|---|---|---|
| Gasoline | 75.5% | 65.0% |
| Fuel Oil | 19.0% | 25.0% |
| Loss | 5.5% | 10.0% |

### Kerosene Distillate

| | | |
|---|---|---|
| Gasoline | 86.0% | 75.0% |
| Fuel Oil | 8.0% | 15.0% |
| Loss | 6.0% | 10.0% |

### Fuel Oil (Based on Fuel Oil charged to Pipe Still)

| | | |
|---|---|---|
| Gasoline | 58.8% | 45.0% |
| Fuel Oil | 34.4% | 45.0% |
| Loss | 6.8% | 10.0% |

[fol. 720] Returns From Operating Four 1,000 Barrel Cross Units with Fractionating Towers, Charge Kerosene Distillate or Gas Oil

Fresh stock required, 54,000 bbls. per month.
Yields as above.

| | | |
|---|---|---|
| **Investment:** | | |
| 2 double 1000-barrel Cross Units delivered, erected, complete and operating, not including refinery lines or tankage | | $455,000.00 |
| **Fixed Charges:** | | |
| Depreciation at 20% | $7,580.00 | |
| Insurance, Taxes at 3% | 1,138.00 | $8,718.00 (1) |
| **Manufacturing Costs:** | | |
| Operating Labor: | | |
| 6 stillmen at $200 per mo. | $1,200.00 | |
| 6 operators " $180 " " | 1,080.00 | |
| 6 firemen " $165 " " | 990.00 | |
| | $3,270.00 | |
| Cleaning Labor: $50 per cycle—12 cycles mo. | 600.00 | |
| Fuel Consumed: 1% of 108,000 bbls. at $1.20 bbl. | 1,296.00 | |

| | | | | |
|---|---|---|---|---|
| Water, Steam & Lights | | 4,000.00 | | |
| Repairs, Maintenance & Misc. | | 1,200.00 | | |
| Total Manufacturing Costs | | | | $10,366.00 (2) |
| [fol. 721] Royalty: | | | | |
| 108,000 bbls. at 10c | | | | 10,800.00 (3) |
| Total operating expense (1) (2) (3) | | | | $29,884.00 |

Using Gas Oil as Charging Stock:

| | | Indicated yields | | Guaranteed yields |
|---|---|---|---|---|
| | | Value of products | | |
| Gasoline at 12c per gal. | (40,770 bbls.) | $205,480.00 | (35,100 bbl.) | $176,904. |
| Fuel Oil at 1.10 per bbl. | | 11,286,00 | | 14,850. |
| Total value products | | $216,766.00 | | $191,754. |
| Expense: | | | | |
| Gas Oil at 3½c per gal. | (54000 bbl.) | $79,380.00 | (54000 bbl.) | $79,380. |
| Operating Expense | | 29,884.00 | | 29,884. |
| Treating at 12½c | (41600 " ) | 5,200.00 | (36200 " ) | 4,525. |
| | | $114,464.00 | | $113,789. |
| Monthly Profit | | $102,302.00 | | $77,965. |

Returns From Operating Four 1,000 Barrel Cross Units with Fractionating Towers, Charge Kerosene Distillate or Gas Oil—Continued

| | | Value of products Indicated yields | | Guaranteed yields |
|---|---|---|---|---|
| Using Kerosene Distillate as Charging Stock: | | | | |
| Gasoline at 12c per gal. | (46400 bbl.) | $234,000.00 | (40500 " ) | $204,000. |
| Fuel Oil at 1.10 per bbl. | ( 4320 " ) | 4,750.00 | ( 8100 " ) | 8,910. |
| Total value products | | $238,750.00 | | $212,910. |
| [fol. 722] Expense: | | | | |
| Kero. Dist. at 4½c per gal. | (54000 " ) | $102,060.00 | (54000 " ) | $102,060. |
| Operating Expense | | 29,884.00 | | 29,884. |
| Treat. & Rerun. 12½c bbl. | (47800 " ) | 6,000.00 | (41800 " ) | 5,200. |
| | | $137,944.00 | | $137,144. |
| Monthly Profit | | $100,806.00 | | $75,766. |

Returns From Operating Four 1,000-Barrel Cross Units with Fractionating Towers in Conjunction with Pipe Still, Taking 80% Overhead for Indicated Results and 75% Overhead for Guaranteed Results

| | |
|---|---|
| Investment: | |
| 2 double 1,000-barrel Cross Units delivered, erected, complete and operating, not including refinery lines or tankage | $455,000.00 |
| 1 Pipe Still for 3,000-4,000 bbls. per day with dephlegmators, towers, pumps etc. | 60,000.00 |
| Total investment | $515,000.00 |

| | | |
|---|---|---|
| **Fixed Charges:** | | |
| Depreciation at 20% | $8,580.00 | |
| Insurance, Taxes at 3% | 1,290.00 | |
| Total Fixed Charges | | $9,870.00 (1) |
| [fol. 723] Manufacturing Costs: | | |
| Operating Labor: | | |
| 6 stillmen at $200 per mo. | $1,200.00 | |
| 6 operators " 180 " " | 1,080.00 | |
| 6 firemen " 165 " " | 990.00 | |
| | $3,270.00 | |
| Cleaning Labor: $50 per cycle × 18 per mo. | 900.00 | |
| Fuel consumed: 1% on 102,800 bbls. Cross units | 1,028.00 | |
| 3% on 68,500 bbls.—pipe still | 2,060.00 | |
| | 3,088 at $1.20 | |
| | $6,180.00 | |
| Water, Steam & Lights | $5,000.00 | |
| Repairs, Maintenance & Misc. | $1,500.00 | |
| Total Manufacturing Costs | | $16,850.00 (2) |

Returns from Operating Four 1,000-Barrel Cross Units with Fractionating Towers in Conjunction with Pipe Still, Taking 80% Overhead for Indicated Results and 75% Overhead for Guaranteed Results—Continued

Royalty:

| | |
|---|---|
| 102,800 bbls. at 10c | $10,280.00 (3) |
| Total operating expense (1) (2) (3) | $37,000.00 |

[fol. 724]

| | | Value of products Indicated yields | | Guaranteed yields |
|---|---|---|---|---|
| Gasoline at 12 per gal. | (37,800 bbl.) | $191,000.00 | (30,800 bbls.) | $155,400.00 |
| Fuel oil at $1.10 per bbl. | (22,100 " ) | 24,300.00 | (30,800 " ) | 33,900.00 |
| Total value Products | | $215,300.00 | | $189,300.00 |
| Expense: | | | | |
| Fuel Oil at $1.30 per bbl. | (64,250 bbl.) | $83,500.00 | (68,500 " ) | $89,000.00 |
| Operating expense | | 37,000.00 | | 37,000.00 |
| Treat. & Rerun. at 12½c | | 4,870.00 | | 3,970.00 |
| | | $125,370.00 | | $129,970.00 |
| Monthly Profit | | $89,930.00 | | $59,330.00 |

[fol. 725] Licensees of the Cross Process

| Company | No. of Units | Location |
|---|---|---|
| Indian Refining Co. | 4 | Lawrenceville, Ill. |
| Petroleum Refining Co. | 1 | Latonia, Ky. |
| Globe Oil and Refining Co. | 1 | Blackwell, Okla. |
| Pure Oil Co. | 26 | Smith's Bluff, Texas |
| Pure Oil Co. | 4 | Heath, Ohio |
| Sapulpa Refining Co. | 6 | Sapulpa, Okla. |
| Roxana Petroleum Corp. | 4 | Wood River, Ill. |
| Sun Oil Co. | 6 | Marcus Hook, Penn. |
| Clayton Oil and Refining Co. | 4 | Dallas, Texas |
| Miller Petroleum Co. | 1 | Wichita Falls, Texas |
| Miller Petroleum Co. | 1 | Humboldt, Kans. |
| Waite Phillips Co. | 2 | Okmulgee, Okla. |
| Waverly Oil Works | 1 | Pittsburgh, Penn. |
| Skelly Oil Co. | 2 | El Dorado, Kans. |
| Omaha Refining Co. | 1 | Omaha, Neb. |
| U. S. Oil and Refining Co. | 1 | Osage, Wyo. |
| American Refining Co. | 2 | Wichita Falls, Texas |
| Medway Oil and Storage Co. | 2 | Isle of Grain, Eng. |
| British-Burmah Oil Co. | 2 | Rangoon, India |
| British-American Oil Co. | 1 | Toronto, Can. |
| Union Oil Co. of Calif. | 1 | Los Angeles, Calif. |
| Cory Bros. and Co., Ltd. | 2 | Kent, England |
| Atlantic Refining Co. | 6 | Franklin, Pa. |
| Atlantic Refining Co. | 6 | Point Breeze, Pa. |
| Pierce Petroleum Corp. | 4 | Sand Springs, Okla. |
| Argentine Government | 2 | Argentine, S. A. |
| Standard Oil Company of N. Y. | 4 | Brooklyn, N. Y. |

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[fol. 726] Defendant's Exhibit No. 2

Gasoline Products Company, Incorporated

November 17, 1926.

H. H. Champlin, Esq., Champlin Refining Company, Enid, Oklahoma.

Dear Sir: This is to asknowledge your letter of November 11 and a letter from Mr. G. E. Leverton, General Auditor of your Company, also dated November 11, transmitting a

check for $8,326.38 to the order of Gasoline Products Corporation.

As you know, the M. W. Kellogg Company are our representatives in negotiating license agreements and matters in connection with such agreements, and I am advised by the Kellogg Company that their arrangements with your Company have not yet been finally concluded. I am, therefore, not depositing your check, but will hold it pending conclusion of your arrangements through the Kellogg Company and I hope that an adjustment satisfactory to all concerned will be consummated promptly.

Very truly yours,

——— ———, Vice-president.

HGA/DG.
cc—L. H. Harvison.

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DEFENDANT'S EXHIBIT No. 3

This exhibit is identical with Exhibit No. 3 annexed to Pleadings and is printed in full on page 44 of this record.

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DEFENDANT'S EXHIBIT No. 4

This exhibit is the same as Exhibit No. 2 annexed to the Pleadings and may be found printed in full on page 36 of this record.

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[fol. 727] DEFENDANT'S EXHIBIT No. 5

This exhibit is a copy of the original German Patent No. 30610 printed in the German language and is here omitted as the next Exhibit, No. 6, contains an English translation of this exhibit.

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DEFENDANT'S EXHIBIT No. 6

German Patent No. 30,610 of 1885

Richard Baynes, John Fearenside, and William Phillips Thompson, in Liverpool, England

Mineral oils and other distillable oils such as resin oils are frequently of dark, almost black color, the removal

of which has been attempted by treating the oils with alkali or acids or both.

In lieu of these substances, we use powdered wood, charcoal, or other adsorbent bodies, which will not decompose, dissolve or modify the oil. Such adsorbing substances are mixed with the oil to form a mud, from which the oil is then distilled off, whereby practically all the coloring matter remains in the adsorption material which can be used for another treatment.

In the practical application of this process, it has been found advisable to pass also the vapor given off through dry adsorptive material. For adsorptive material, we use powdered wood, charcoal, bone coal, powdered coke, chalk, earth, clay, clacined or unclacined clay, earth or pumice stone. The best results were obtained with powdered coke, charcoal or bone char which had been satiated with zinc chloride solution, also dry pumice stone bath a of high boiling point with a thermometer. My means of a Pipe B superheated steam may be introduced into the still A. The latter being also heated by the fire C. The vapors from A are led into the specially constructed purifier D. Several of the purifiers may be used, communicating with each other, the last one being connected with the condenser G. Two purifiers D and D1 are shown in the accompanying [fol. 728] drawing. We do not make any claim for the use of several purifiers; any ordinary gas purifier or combinations may be used for this purpose in such a way that one or several of them may be temporarily eliminated from the system for cleaning purposes while the remaining purifiers are used. Where oils of a high vapor tension are used, the purifiers are jacketed so that superheated steam or air may be let through the jackets in order to bring the temperature somewhat above the boiling point of the oil in use.

A layer of charcoal mixed with chalk or zinc chloride is put on top of the perforated bottoms E, the size of the charcoal varying from that of a mustard seed to a pea. Other indifferent material as aforementioned may be used instead of charcoal, although it has been found that charcoal is best suited for continuous operation.

It is recommended to have the oil vapors uniformly passed through the layers of adsorptive material. For this purpose a pipe which is perforated on the bottom side

is made use of to introduce the vapors into the powder. It is imperative that all these materials are absolutely dry and for this purpose they are heated to about 180° C. prior to use in order to remove all moisture. The adsorptive material which does not come in contact with the liquid oil is also heated to a temperature above the boiling point of the oil to be distilled.

The shape of the still to be used is immaterial. According to our observation, it appears that the oil has a tendency to flow through the adsorptive material toward the walls of the still due to capillary action making the use of a special stirring device unnecessary. The adsorptive material which remains at the end of the operation is in a powdered or granular form and can be used without further treatment in a new operation. The impregnation of the bone black, etc., with zinc chloride serves to remove from the oil its sulphur and analogeous compounds. Instead of impregnating the carbon with zinc chloride, both substances may be used separately. We have also found that the additions of unslacked lime to other adsorptive material will [fol. 729] make the use of zinc chloride unnecessary. Such oxides which have a strong affinity for sulphur may also be used with lighter and more volatile oils. An apparatus which is especially suitable for paraffin oils or high boiling mineral oil is shown in the drawing. The still A is conveniently arranged in an oil purifiers so that the vapors from the still impinge against the bottom of the purifier D and D1 resulting in an equal distribution of the vapors passing through the layer of adsorptive materials. The pipe F, near the bottom of the purifier, serves to introduce superheated steam so that the charcoal may be dried or heated as required. This arrangement will eliminate the necessity of jacketing the purifier.

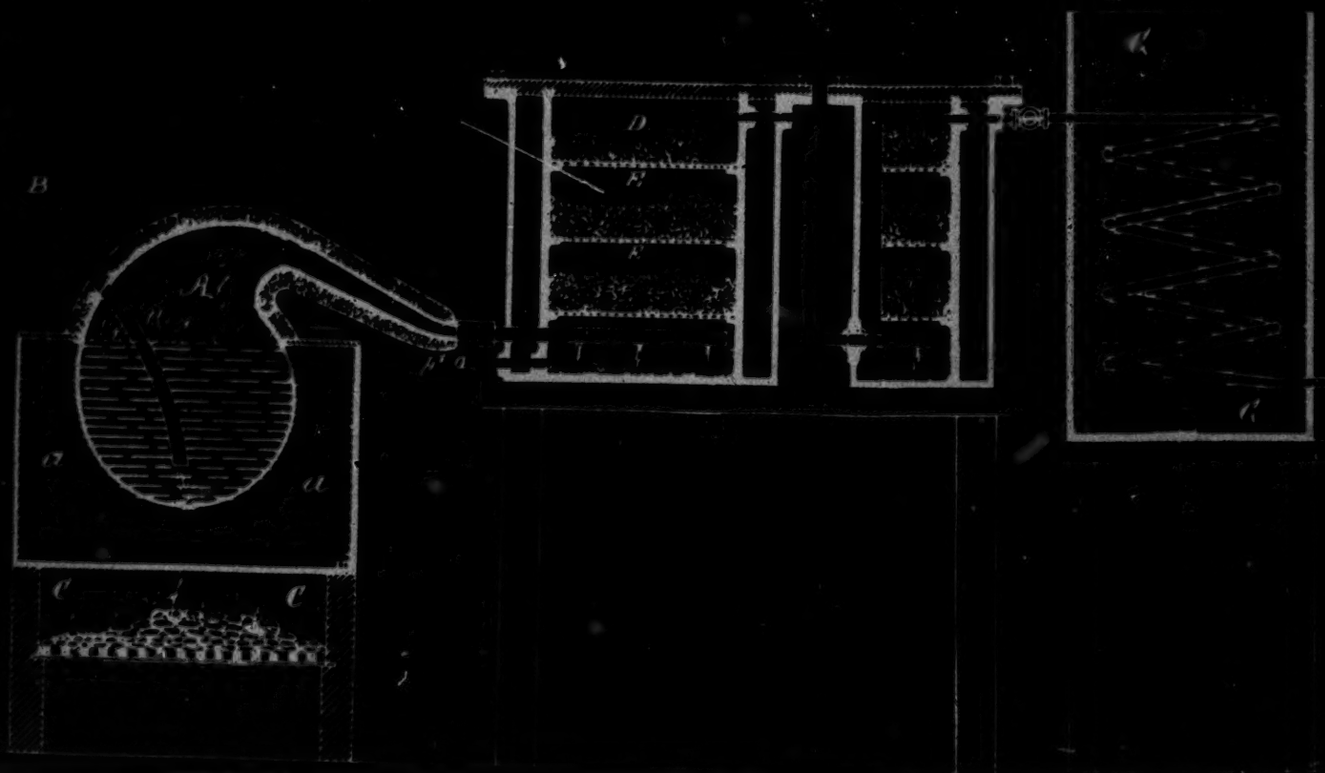
Where heavy hydrocarbons are used, the operation is conducted in such a way that after the perforated bottoms covered with wood charcoal are thoroughly dried by superheated steam or the like the oil is introduced into the still. The oil may already be mixed with the wood charcoal. The still is now heated and superheated vapor is introduced. The vapors produced by fractional distillation or otherwise are led through the layers of charcoal where coloring material and other impurities are retained, the use of superheated steam may be omitted.

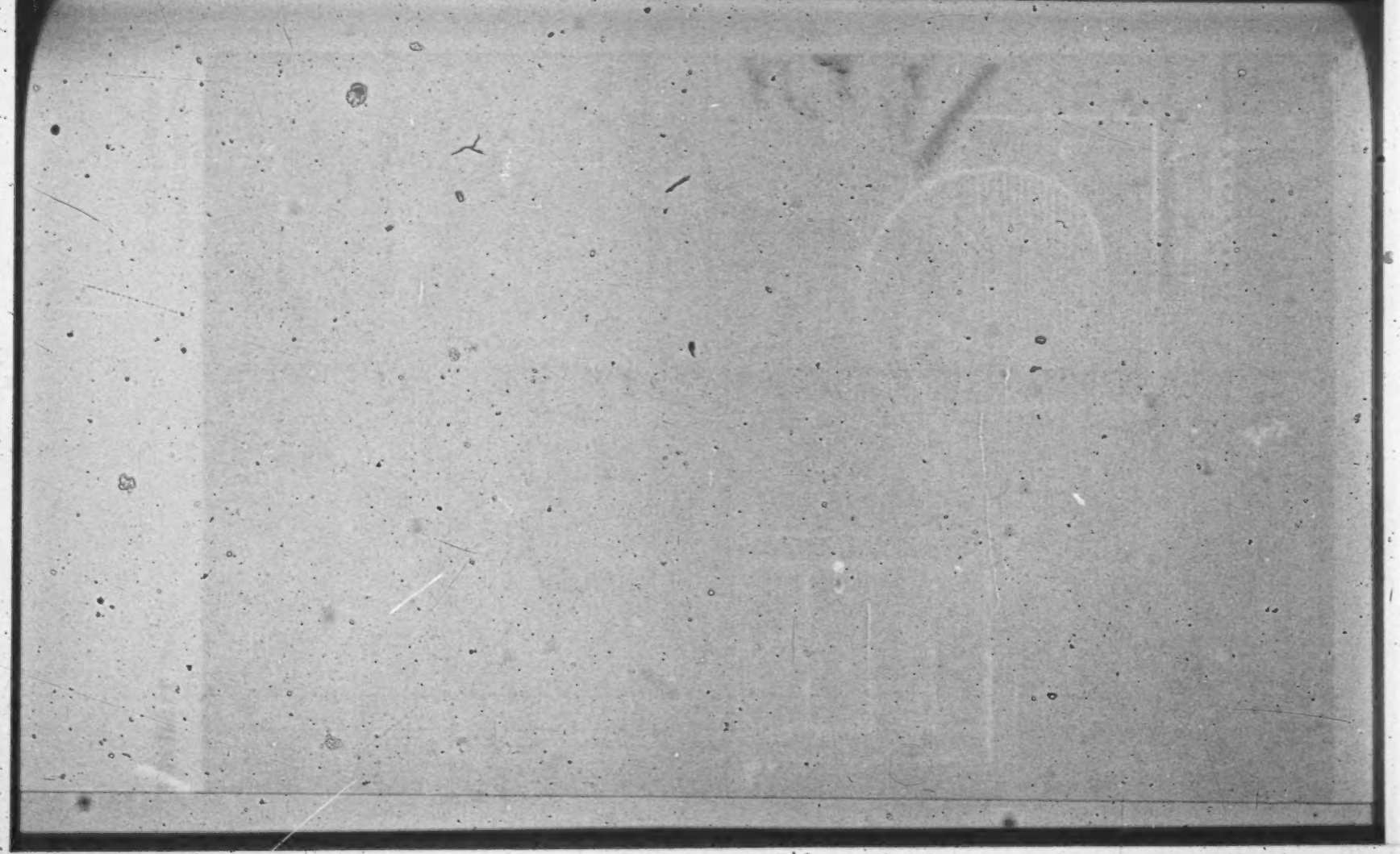
**DEFENDANT'S EXHIBIT No. 7**

RICHARD BAYNN HEARNSIDE
AND WILLIAM PHILLIPSON OF LIVERPOOL
COUNTY OF ENGLAND

Verfahren und Apparate zum Bleichen von Petroleum und anderen destillir-

b





The vapors leaving the last purifier, enter into the cooling coil of the condenser G and enter as bleached, purified oil into the airtight container Q from whence the uncondensible vapors are removed by means of an air pump or vacuum in order to lower the boiling point of the oil and to economize on fuel.

As adsorptive material, we also use advantageously iron hydrate or only powdered lime in order to remove the sulphur from the oil. This latter treatment, however, seems to be indicated in the case of light and volatile oils.

Claim 1. Bleaching and purification of oil by passing the oil vapors through freshly heated porous substances such as wood, charcoal, powdered coke, bone black, pumice stone earth, clay, iron oxyhydrate powdered chalk and other adsorptive material with or without the introduction of super-
[fol. 730] heated steam at atmospheric pressure or below in order to remove coloring material and other admixtures from the vapors.

Claim 2. An apparatus shown and described for bleaching and purifying oil consisting of a still A arranged in a bath having a higher boiling point than the oil to be distilled, one or several steam jacketed purifiers, a condenser G and an air pump or an airtight container Q maintained under vacuum.

(Here follows photograph accompanying German patent, side folios 731 and 732.)

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[fol. 733] DEFENDANT'S EXHIBIT No. 8

This exhibit is identical with Exhibit No. 1 annexed to the Pleadings and is printed in full on page 31 of this record.

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DEFENDANT'S EXHIBIT No. 9

This exhibit is identical with Exhibit A attached to the Plaintiff's Motion to Substitute Declaration for Bill in Equity, and may be found on page 7 of this Record.

DEFENDANT'S EXHIBIT No. 35

Cross Engineering Company (Inc.), Kansas City, Mo.

June 10th, 1926.

Champlin Refining Co., Enid, Oklahoma.

Attention Mr. P. E. Slater

GENTLEMEN: We are enclosing, herewith, an estimate and drawings covering three vapor phase treating towers for your two 2,000 barrel Cross cracking units.

The price of the material using the bucket hoist and screw conveyer would be $18,002.00. We believe that the bucket hoist and screw conveyer is more satisfactory than electric hoist and trolley. However, we have shown on the bottom of the estimate the cost of this latter equipment.

The labor of installing these towers including everything should run approximately $3,500.00, making a total cost for installing the towers of $21,502.00.

Probably the best method of removing this clay from the towers would be by means of small dump cars, operating on a narrow gage track. We are enclosing, herewith, prices [fol. 734] of dump cars, trackage, and switches. The cost of this equipment would, of course, depend upon the length of the track.

I shall make an effort to get in Enid within a very few days and go over with you the proposed compounding plant and these towers.

With kindest personal regards, I am

Very truly yours, Cross Engineering Company by R. Mitchell.

RM:MCC.
Enclosures.

Champlin Refining Co., Enid, Oklahoma

Towers, etc., for Treater.

6-8-26.

F. O. B. Enid, Okla.

| | |
|---|---|
| 3 Towers 12'-0" x 12'-0"-5/8" Shell, 3/4" heads, 2-30" Dia. manholes & covers. Flanges, etc., as per print - 25,000# ea. - 75,000# total - 37½ tons at 175.00 | 6500.00 |

| | |
|---|---|
| Tower structural supports, walkways, etc. 37,800# – 19 tons at 125.00 | 2400.00 |
| 2300 Sq. Ft. insulation at 70c | 1610.00 |
| Insulation for Fire Protection: | |
| 12 Cu. Yds. concrete at 10.00 | 120.00 |
| 4000 Brick at 17.00 | 68.00 |
| 2500 Ft. wire #12 Ga. at | 11.00 |
| Column Footings: | |
| 6½ Cu. Yds. concrete at 10.00 | 65.00 |
| 800 Ft. ½" Dia. Bars 100 Ft. each Col. | 28.00 |
| 8" Screw conveyer, 38" hoist complete with motor | 1700.00 |
| Pipe, Fittings, & insulation | 3500.00 |
| Miscellaneous | 2000.00 |
| | 18002.00 |

[fol. 735] Industrial track & cars—See unit price attached.

| | |
|---|---|
| Alternate for screw conveyor: | |
| 1 1½ ton hoist with motor & trolley complete—F. O. B. Philadelphia | 910.00 |
| Approximately 5 Tons additional structural steel required for overhead clearance & wider track area at 125.00 | 625.00 |
| Sackett Screen & Chute Co.—1 ton capacity Buckets at 120.00 ea.—4 required | 480.00 |
| Freight—about | 200.00 |
| | 2215.00 |

6-8-26.

Our cost F. O. B. Chicago—From H. Channon Catalog #99.

2-way dump cars #451:

21 cu. ft. capacity—180.00 ea.—Wt. 900#
27 " " " —190.00 ea.— " 975#

Scoop car #420:

12 cu. ft. capacity—120.00 ea.—Wt. 500#
18 " " " —145.00 " " 625#
21 " " " —160.00 " " 775#
27 " " " —175.00 " " 850#

Portable track:

24" Gauge—#950-A—Trac. in 15' sections made up of 12# rail, complete with steel ties—90c per ft. of track.

Curves extra 35c per foot (1.25 per foot).

Switches:

| | | | | | | |
|---|---|---|---|---|---|---|
| #955-A—24# | gauge | one | way | switch | ..... | 64.00 |
| " | " | " | two | " | " ..... | 75.00 |
| " | " | " | three | " | " ..... | 160.00 |

Shipment track & switches, 10 days.
" cars 2 weeks.

---

[fol. 736] DEFENDANT'S EXHIBIT No. 37

June 22nd, 1926.

Kaw Boiler Works, Kansas City, Kansas.

GENTLEMEN: We are enclosing, herewith, one blue print each of drawings number 164-1, 2, and 4, showing steel polymerizers and supports.

Please make proposal on fabricating the steel shown on these drawings, to be delivered to the Champlin Refining Company, Enid, Oklahoma.

Please make your quotation direct to the Champlin Refining Company, to the attention of Mr. P. E. Slater.

Very truly yours, Cross Engineering Company, by

——— ———.

RM:MCC.
Enclosures.
C-C Mr. P. E. Slater.

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DEFENDANT'S EXHIBIT No. 38

June 22nd, 1926.

Mount Cooper Iron & Boiler Works, Tulsa, Oklahoma.

GENTLEMEN: We are enclosing, herewith, one blue print each of drawings number 164-1, 2, and 4, showing steel polymerizers and supports.

[fols. 737 & 738]

DEFENDANT'S EXHIBIT No. 61

Guaranteed Yields—Handbook Prices—Champlin Expenses

Cross Plant

Champlin Refining Company

From Completion of Plant Sept. 20, 1926 to Completion

Treating Plant

| | 1926 Sept. 20-30 | October, 1926 | November, 1926 | December, 1926 | January, 1927 | To Feb. 8—1927 Still #1 Feb. 23—Still #2 |
|---|---|---|---|---|---|---|
| **Guaranteed Recoveries:** | | | | | | |
| Gasoline—Bbls. (65%) | 11,700 | 35,100 | 35,100 | 35,100 | 35,100 | 17,550 |
| Gals. | 491,400 | 1,474,200 | 1,474,200 | 1,474,200 | 1,474,200 | 737,100 |
| Hand Book Price | 10.3 | 9.953 | 9.20 | 9.344 | 9.10 | 8.743 |
| Sales Value | 50,614.20 | 146,727.13 | 135,626.40 | 137,749.25 | 134,152.20 | 64,444.65 |
| Fuel Oil—Bbls. (25%) | 4,500 | 13,500 | 13,500 | 13,500 | 13,500 | 6,750 |
| Hand Book Price | 1.2875 | 1.244 | 1.195 | 1.172 | 1.163 | 1.1630 |
| Sales Value | 5,793.75 | 15,500.00 | 14,937.50 | 14,650.00 | 14,537.50 | 7,850.25 |
| Total Value—Products | 56,407.95 | 162,227.13 | 150,563.90 | 152,399.25 | 148,689.70 | 72,294.90 |
| **Charging Stock (Guaranteed):** | | | | | | |
| Gas Oil—Bbls. | 18,000 | 54,000 | 54,000 | 54,000 | 54,000 | 27,000 |
| Hand Book Price (Gal.) | 4.313 | 4.313 | 4.312 | 4.484 | 4.388 | 4.3125 |
| (Bbl.) | 1.81146 | 1.81146 | 1.811.04 | 1.88328 | 1.84296 | 1.81125 |
| Value—Gas Oil | 32,606.28 | 97,818.84 | 97,796.16 | 101,697.12 | 99,519.84 | 48,903.75 |
| Gross Profit | 23,801.67 | 64,408.29 | 52,767.74 | 50,702.13 | 49,169.86 | 23,391.15 |
| **Cost of Producing—Gross Profit:** | | | | | | |
| Direct Expenses per month | 2,165.15 | 6,495.44 | 6,495.44 | 6,495.44 | 6,495.44 | 3,247.72 |
| Compensation Insurance at $3.16 per 100.00 | 23.37 | 70.10 | 70.10 | 70.10 | 70.10 | 35.05 |
| Clay for Towers at 5.00 per 1000.00 Bbls. Gasoline | 58.50 | 175.50 | 175.50 | 175.50 | 175.50 | 87.75 |
| Royalty Cross Plant | 3,600.00 | 10,800.00 | 10,800.00 | 10,800.00 | 10,800.00 | 5,400.00 |
| Total Expenses | 5,847.02 | 17,541.04 | 17,541.04 | 17,541.04 | 17,541.04 | 8,770.52 |
| Profits after Cost of Producing | 17,954.65 | 46,867.25 | 35,226.70 | 33,161.09 | 31,628.82 | 14,620.63 |

DEFENDANT'S EXHIBIT No. 61

**Guaranteed Yields—Handbook Prices—Champlin Expenses**

**Cross Plant**

**Champlin Refining Company**

**From Completion of Plant Sept. 20, 1926 to Completion**

**Treating Plant**

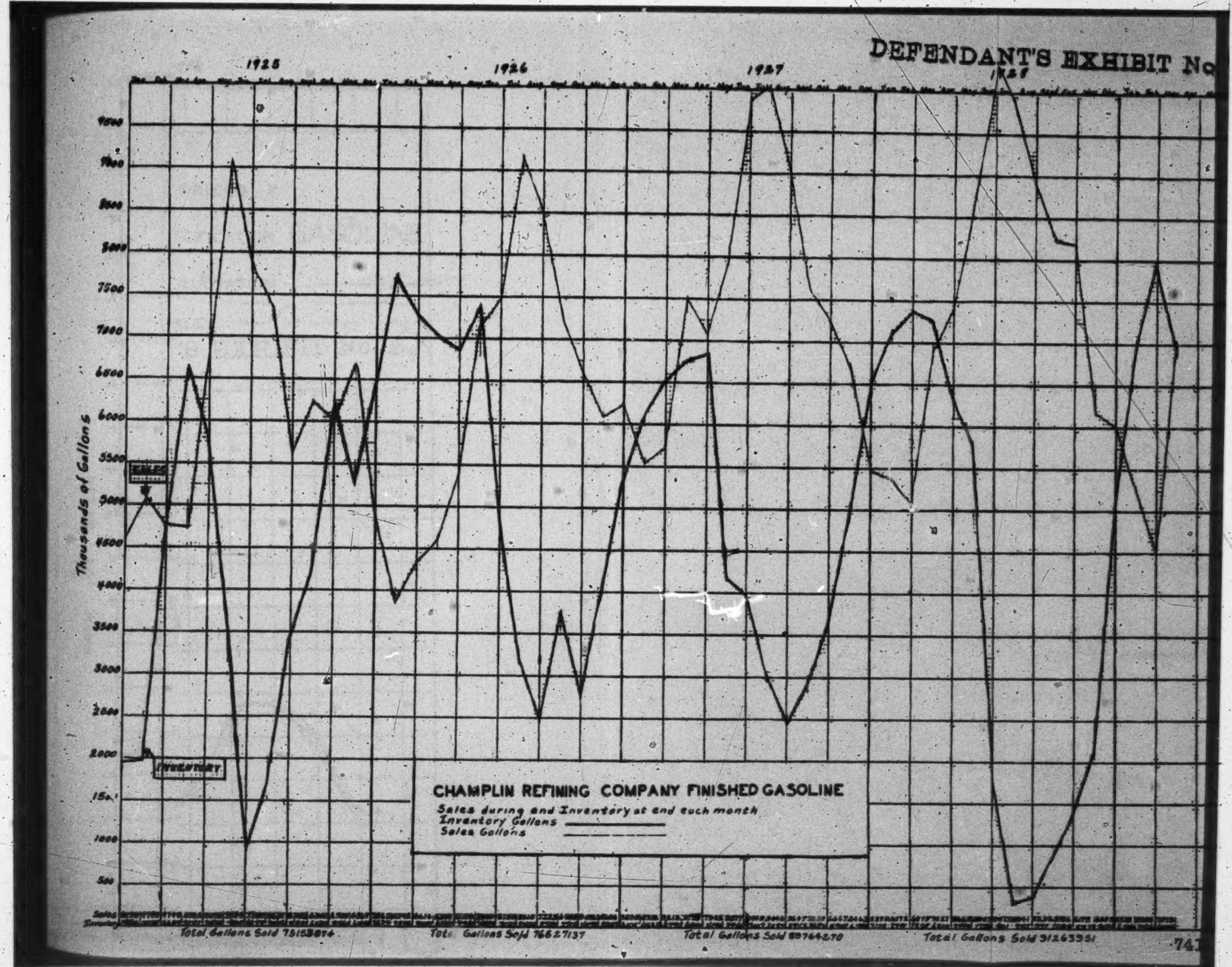
| | 1926 Sept. 20-30 | October, 1926 | November, 1926 | December, 1926 | January, 1927 | To Feb. 8—1927 Still #1 Feb. 23—Still #2 | Totals |
|---|---|---|---|---|---|---|---|
| .... | 11,700 | 35,100 | 35,100 | 35,100 | 35,100 | 17,550 | 169,650 |
| .... | 491,400 | 1,474,200 | 1,474,200 | 1,474,200 | 1,474,200 | 737,100 | 71,125,300 |
| .... | 10.3 | 9.953 | 9.20 | 9.344 | 9.10 | 8.743 | ..... |
| .... | 50,614.20 | 146,727.13 | 135,626.40 | 137,749.25 | 134,152.20 | 64,444.65 | 669,313.83 |
| .... | 4,500 | 13,500 | 13,500 | 13,500 | 13,500 | 6,750 | 65,250 |
| .... | 1.2875 | 1.244 | 1.195 | 1.172 | 1.163 | 1.1630 | ..... |
| .... | 5,793.75 | 15,500.00 | 14,937.50 | 14,650.00 | 14,537.50 | 7,850.25 | 73,269.00 |
| .... | 56,407.95 | 162,227.13 | 150,563.90 | 152,399.25 | 148,689.70 | 72,294.90 | 742,582.83 |
| .... | 18,000 | 54,000 | 54,000 | 54,000 | 54,000 | 27,000 | 261,000 |
| .... | 4.313 | 4.313 | 4.312 | 4.484 | 4.388 | 4.3125 | ..... |
| .... | 1.81146 | 1.81146 | 1.811.04 | 1.88328 | 1.84296 | 1.81125 | ..... |
| .... | 32,606.28 | 97,818.84 | 97,796.16 | 101,697.12 | 99,519.84 | 48,903.75 | 478,341.99 |
| .... | 23,801.67 | 64,408.29 | 52,767.74 | 50,702.13 | 49,169.86 | 23,391.15 | 264,240.84 |
| .... | 2,165.15 | 6,495.44 | 6,495.44 | 6,495.44 | 6,495.44 | 3,247.72 | 31,394.63 |
| 0.00 | 23.37 | 70.10 | 70.10 | 70.10 | 70.10 | 35.05 | 338.82 |
| Bbls. | | | | | | | |
| .... | 58.50 | 175.50 | 175.50 | 175.50 | 175.50 | 87.75 | 848.25 |
| .... | 3,600.00 | 10,800.00 | 10,800.00 | 10,800.00 | 10,800.00 | 5,400.00 | 52,200.00 |
| .... | 5,847.02 | 17,541.04 | 17,541.04 | 17,541.04 | 17,541.04 | 8,770.52 | 84,781.70 |
| .... | 17,954.65 | 46,867.25 | 35,226.70 | 33,161.09 | 31,628.82 | 14,620.63 | 179,459.14 |

**Guaranteed Yield Hand Book Price Champlin Expense Cross Cracking Plant**

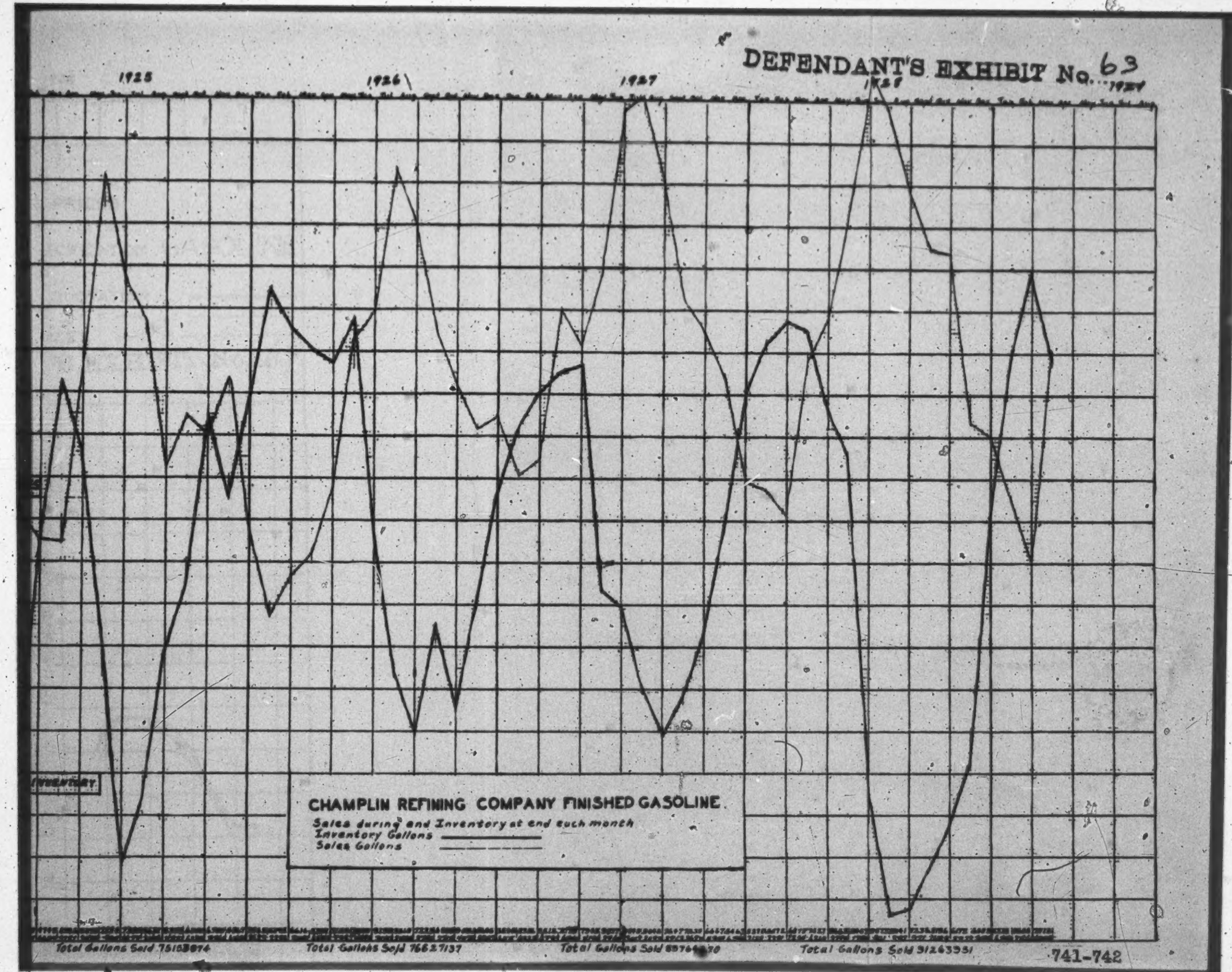
**Champlin Refining Company**

**Sept. 20, 1926 to Completion of Treating Plant.**

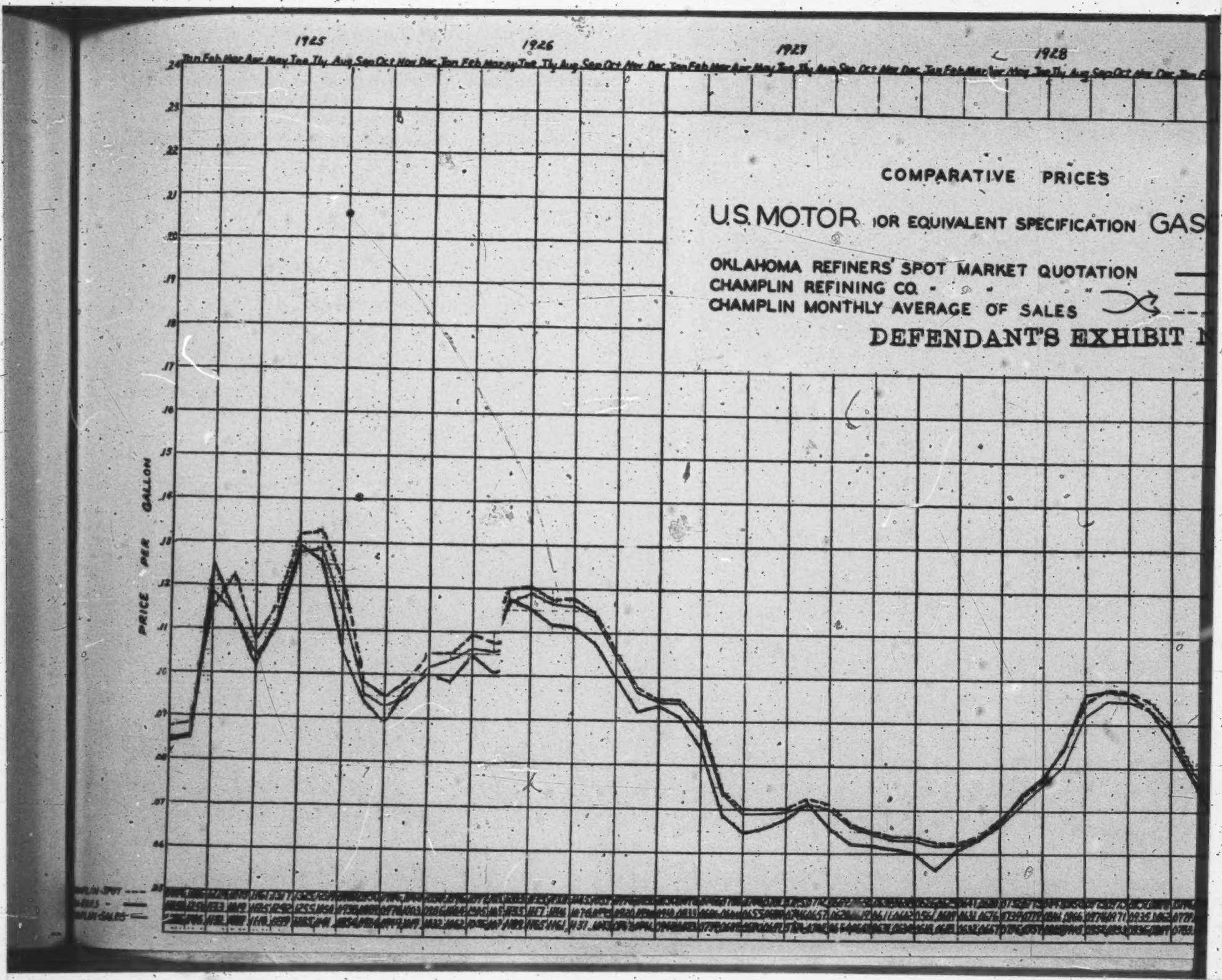
DEFENDANT'S EXHIBIT No



DEFENDANT'S EXHIBIT No. 63




741-742


1925
1926
1927
1928
COMPARATIVE PRICES
U.S. MOTOR OR EQUIVALENT SPECIFICATION GAS
OKLAHOMA REFINERS' SPOT MARKET QUOTATION
CHAMPLIN REFINING CO.
CHAMPLIN MONTHLY AVERAGE OF SALES
DEFENDANT'S EXHIBIT
PRICE PER GALLON

1925 1926 1927 1928

Jan Feb Mar Apr May Jne Jly Aug Sep Oct Nov Dec Jan Feb Mar Apr May Jne Jly Aug Sep Oct Nov Dec Jan Feb Mar Apr May Jne Jly Aug Sep Oct Nov Dec Jan Feb Mar Apr May Jne Jly Aug Sep Oct Nov Dec Jan Feb Mar Apr May

COMPARATIVE PRICES

U.S. MOTOR OR EQUIVALENT SPECIFICATION GASOLINE

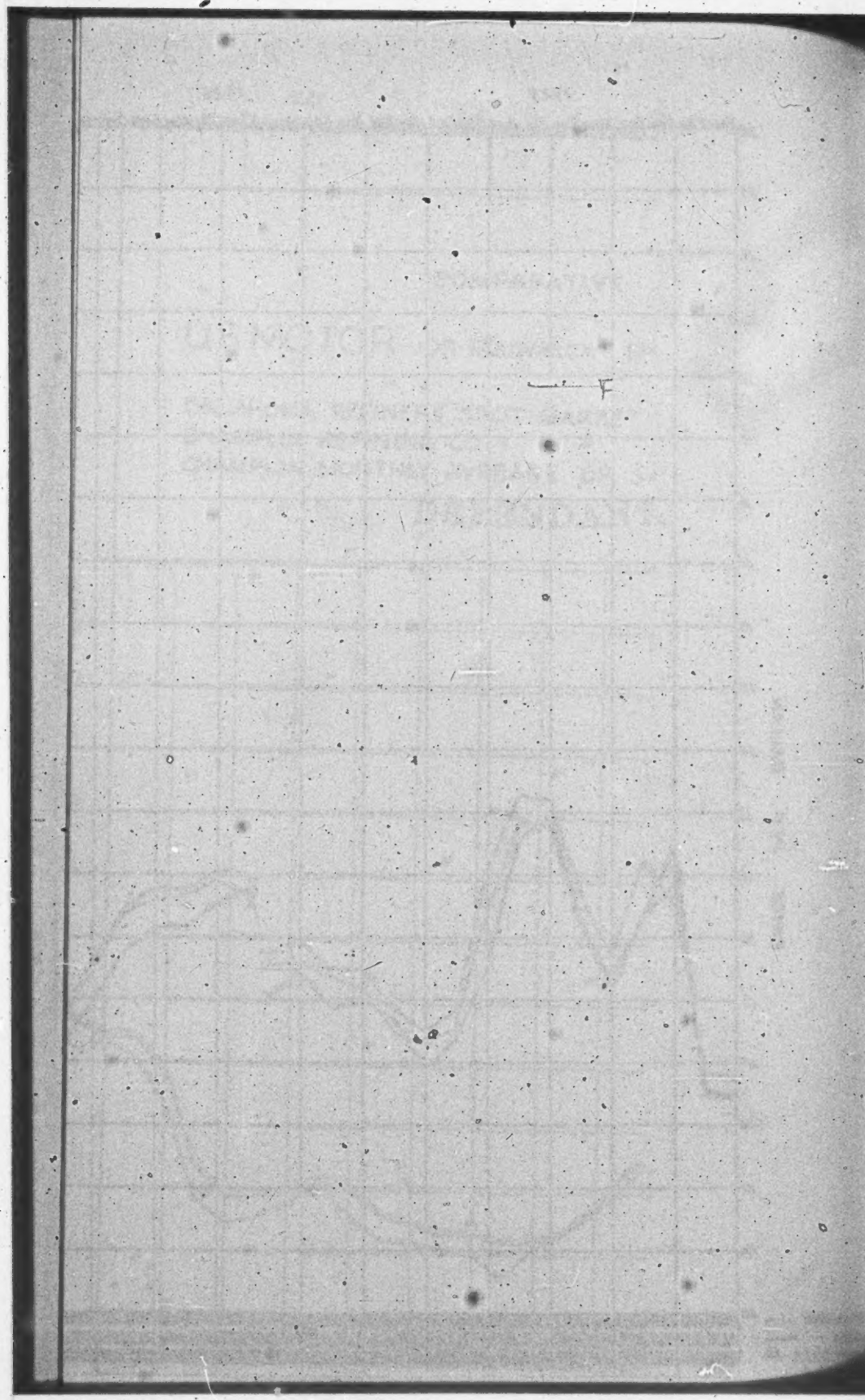
OKLAHOMA REFINERS SPOT MARKET QUOTATION ———

CHAMPLIN REFINING CO. " " " ———

CHAMPLIN MONTHLY AVERAGE OF SALES ---------

DEFENDANT'S EXHIBIT No. 64

743-744



Please make proposal on fabricating the steel shown on these drawings, to be delivered to the Champlin Refining Company, Enid, Oklahoma.

Please make your quotation direct to the Champlin Refining Company, to the attention of Mr. P. E. Slater.

Very truly yours, Cross Engineering Company, by

——— ———.

RM:MCC.
Enclosures.
C-C Mr. P. E. Slater.

(Here follows Defendant's Exhibit No. 61, side folios 737 and 738.)

[fols. 739 & 740] DEFENDANT'S EXHIBIT No. 62

Computation of Interest

Champlin Refining Company

Loss on Cross Cracking Plant

| Period of loss | Amount of loss | Interest computed from | Time elapsed to Apr. 25, 1929 | Interest to Apr. 25, 1929 |
|---|---|---|---|---|
| Sept. 20-30-1926..... | 17954.65 | Oct. 25-1926 | 2y 6m 2da | 2699.10 |
| October, 1926..... | 46867.25 | Nov. 15-1926 | 2y 5m 11da | 6903.95 |
| November, 1926..... | 35226.70 | Dec. 15-1926 | 2y 4m 1da | 4937.52 |
| December, 1926..... | 33161.09 | Jan. 15-1927 | 2y 3m 1da | 4482.21 |
| January, 1927..... | 31628.82 | Feb. 15-1927 | 2y 2m 1da | 4116.68 |
| February 1 to 23-1927..... | 14620.63 | Mar. 12-1927 | 2y 1m 13da | 1858.72 |
| Totals ..... | 179459.14 | | | 24998.18 |

Interest after Apr. 25-1929 on 179459.14 is 25.50 per day.

(Here follow Defendant's Exhibits 63 and 64, side folios 741-742 and 743-744)

[fol. 745] DEFENDANT'S EXHIBIT No. 65

Cross Development Corporation

January 9, 1926.

P. C. Keith, Esq., Cross Engineering Company, 700 Baltimore Avenue, Kansas City, Missouri.

Subject: Vapor Phase Treating

DEAR MR. KEITH:

As you know, we are very anxious to secure at the earliest posible date an installation of our vapor phase treating

process. To secure such an installation we are prepared to give a free license, if the installation is made in connection with the Cross cracking process. This free license would, of course, apply only to the first installation made as we will expect on the basis of the results achieved to determine the appropriate license charge.

We will issue a license to cover this installation which will follow in principal the language of the Gasoline Products Company license covering the Cross cracking process and will include a provision in substantially the same language as Paragraph 6 of the Gasoline Products Company license, in accordance with which we will undertake the defense of any suits instituted against the licensee for infringement.

Very truly yours, —— ——, Vice-President.

CHW:HY.

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DEFENDANT'S EXHIBIT No. 69

Kansas City Testing Laboratory, Kansas City, Mo.

December 23, 1925.

95273—Champlin heavy gas oil
95290—Champlin light gas oil

Gasoline Products Co., 700 Baltimore Ave., Kansas City, Mo.

GENTLEMEN: Herewith in quadruplicate are the summarized reports of cracking tests of samples of light gas oil and of heavy gas oil submitted from the Champlin Refining Company.

[fol. 746] Please note that the yields suggested cover the manufacture of 437° F. end point gasoline and good merchantable fuel oil. If larger yields are obtained then the fuel oil is not of as good a character, having a higher viscosity.

It is particularly to be noted that both these stocks yield a very light gasoline. We believe that we are perfectly safe in representing yields of 65% on the heavy gas oil and 70% on the light gas oil, provided conditions at the refinery are such as to obtain good condensation and to limit re-

finery losses in treating. Vapor phase treating would be desirable.

Samples of gasoline treated by vapor phase method, as made from these gas oils, are submitted herewith, together with a sample of the fuel oil made from the heavy gas oil.

Very truly yours, Kansas City Testing Laboratory, by Roy Cross.

RC-E.

Report of Analysis

For Gasoline Products Co., 700 Baltimore —, Kansas City, Mo.

Date: Dec. 21, 1925.
Laboratory No.: 95290.
Sample Marked: Light Gas Oil—Champlin Refining Co.

Analysis

Summary of Cracking Test

| | | |
|---|---|---|
| Gravity of charging stock | 35.0° Be. | |
| Color of charging stock | Straw | |
| Gravity of synthetic crude | 39.8° Be. | |
| Yields: | | |
| | First cycle | Ultimate with recycling |
| Gasoline | 31.0% | 82.5% |
| Recharging Stock (32.1°Be) | 63.0% | 0 |
| Fuel Oil | 4.0% | 11.5% |
| Loss (gas and carbon) | 2.0% | 6.0% |

[fol. 747]

| | | |
|---|---|---|
| Gasoline: | | |
| Gravity | 62.1° Be. | 60° Be. |
| End Point | 437° F. | |
| Safe Commercial Yields: | | |
| Gasoline | 70% | |
| Fuel Oil | 20% | |
| Loss | 10% | |

Remarks: ——.

Respectfully submitted.

Kansas City Testing Laboratory, by Roy Cross.

46—362

Report of Tests of Gasoline, Naphtha and Kerosene

For Gasoline Products Co., 700 Baltimore, Kansas City, Mo.

Laboratory Number: 95290.

Date: Dec. 21, 1925.

Identification: Gas Oil Light—Champlin.

Analysis

Specific Gravity at 60° F (Water—1.000 at 60°F) = .850

Doctor Test =

Baume Gravity (A. P. I. at 60° F) = 34.9° Be. Flash Point =

*Color (Saybolt) (Standard = over 16) = Fire Test = Odor = *Copper Corrosion

Distillation

| | Fraction | Temperature ° F | *Motor gasoline |
|---|---|---|---|
| Initial Boiling Point | 0% | 440 | |
| | 5 | 480 | 131° F |
| | 10 | 498 | |
| | 15 | 518 | |
| | 20 | 530 | |
| | 25 | 542 | 221° F |
| | 30 | 552 | |
| | 35 | 562 | |
| | 40 | 576 | |
| | 45 | 588 | |
| [fol. 748] Middle Point | 50 | 598 | |
| | 55 | 610 | 284° F |
| | 60 | 622 | |
| | 65 | 640 | |
| | 70 | 652 | |
| | 75 | 666 | |
| | 80 | 682 | |
| | 85 | 698 | |
| | 90 | 715 | |
| | 95 | 730 | 392° F |
| End Point | 100 | 762 | 437° F |
| Distillate Recovered | | | 95% |

Remarks: ——.

Respectfully submitted.

Kansas City Testing Laboratory, by Roy Cross.

*U. S. motor gasoline.

Fractional Gravity Distillation Analysis of Petroleum

For Gasoline Products Co., 700 Baltimore —, Kansas City, Mo.

Laboratory No.: 95290.

Date: Dec. 21, 1925.

Mark: Synthetic Crude from Champlin Light Gas Oil.

Specific Gravity: .826.

Baume Gravity A. P. I.: 39.8.

Viscosity: 70° F. —. Color: —. Cold test (Flow): —. Sulphur: —.

| % | Temp. ° F | Gravity of fraction | Gravity of total over | Gravity of stream | Product |
|---|---|---|---|---|---|
| | | | | .633 = 92.0 | .... |
| 0 | 78 | .633 = 92.0 | .633 = 92.0 | .644 = 88.2 | .... |
| | 110 | | | .654 = 84.9 | .... |
| 5 | 140 | .675 = 78.1 | .654 = 84.9 | .690 = 73.6 | .... |
| | 184 | | | .727 = 63.6 | .... |
| 10 | 217 | .727 = 63.6 | .678 = 77.2 | .740 = 59.7 | .... |
| | 252 | | | .754 = 56.2 | .... |
| [fol. 749] | | | | | |
| 15 | 278 | .754 = 56.2 | .697 = 71.5 | .767 = 53.0 | .... |
| | 300 | | | .780 = 49.9 | .... |
| 20 | 331 | .780 = 49.9 | .714 = 66.7 | .790 = 47.6 | .... |
| | 357 | | | .801 = 45.1 | .... |
| 25 | 389 | .801 = 45.1 | .728 = 62.9 | .807 = 43.8 | .... |
| | 408 | | | .814 = 42.3 | .... |
| 30 | 425 | .814 = 42.3 | .741 = 59.5 | .817 = 41.7 | .... |
| | 447 | | | .823 = 40.4 | .... |
| 35 | 469 | .823 = 40.4 | .751 = 56.9 | .828 = 39.4 | .... |
| | 480 | | | .833 = 38.3 | .... |
| 40 | 491 | .833 = 38.3 | .760 = 54.7 | .837 = 37.6 | .... |
| | 502 | | | .841 = 36.8 | .... |
| 45 | 512 | .841 = 36.8 | .768 = 52.7 | .844 = 36.2 | .... |
| | 524 | | | .846 = 35.8 | .... |
| 50 | 536 | .846 = 35.8 | .775 = 51.1 | .850 = 35.0 | .... |
| | 544 | | | .853 = 34.4 | .... |
| 55 | 554 | .853 = 34.4 | .781 = 49.7 | .857 = 33.6 | .... |
| | 560 | | | .860 = 33.0 | .... |
| 60 | 565 | .860 = 33.0 | .788 = 48.1 | .861 = 32.5 | .... |
| | 573 | | | .863 = 32.8 | .... |

| % | Temp. ° F | Gravity of fraction | Gravity of total over | Gravity of stream | Product |
|---|---|---|---|---|---|
| 65 | 580 | .863 = 32.5 | .792 = 47.2 | .867 = 31.7 | .... |
| | | | | .871 = 31.0 | .... |
| 70 | | .871 = 31.0 | .798 = 45.8 | .875 = 30.2 | .... |
| | | | | .879 = 27.7 | .... |
| 75 | | .879 = 27.7 | .803 = 44.7 | .885 = 27.5 | .... |
| | | | | .891 = 27.3 | .... |
| 80 | | .891 = 27.3 | .808 = 43.6 | .896 = 26.4 | .... |
| | | | | .902 = 25.4 | .... |
| 85 | | .902 = 25.4 | .813 = 42.5 | .932 = 20.3 | .... |
| | | | | .975 = 13.6 | .... |
| 90 | | .975 = 13.6 | .822 = 40.6 | | .... |
| 95 | | | | | |
| 100 | | | | | |

Remarks (over): ——.

Roy Cross.

[fol. 750] Report of Analysis

For Gasoline Products Co., 700 Baltimore — Kansas City, Mo.

Date: Dec. 21, 1925.

Laboratory No.: 95273.

Sample Marked: Heavy Gas Oil—Champlin Refining Co.

Analysis

Summary of Cracking Test

| | |
|---|---|
| Gravity of charging stock | 28.4° Be. |
| Color of charging stock | N. P. A. = E |
| Gravity of synthetic crude | 34.8° Be. |

| | First cycle | Ultimate with recycling |
|---|---|---|
| Yields: | | |
| Gasoline | 30.0% | 75.0% |
| Recharging Stock (30.8° Be.) | 60.0% | 0 |
| Fuel Oil | 9.0% | 21.0% |
| Loss (gas and carbon) | 1.0% | 4.0% |
| Gasoline: | | |
| Gravity | 62.9° Be. | 60.0° Be. |
| End Point | 437° F. | 437° F. |

| | First cycle | Ultimate with recycling |
|---|---|---|
| Fuel Oil: | | |
| Gravity | 2° Be. = (= 1.056 | 10° Be. |
| Safe Commercial Yield: | | |
| Gasoline | 65.0% | |
| Fuel Oil | 25.0% | |
| Loss | 10.0% | |

Remarks: ——.

This charging stock is well suited to making light gasoline. The initial boiling point of the gasoline obtained is determined by the temperature of condensation.

Respectfully submitted.

Kansas City Testing Laboratory, by Roy Cross.

[fol. 751] Report of Tests of Gasoline, Naphtha and Kerosene

For Gasoline Products Co., 700 Baltimore, Kansas City, Mo.

Laboratory Number: 95273.

Date: Dec. 21, 1925.

Identification: Gas Oil, Heavy—Champlin.

Analysis

Specific Gravity at 60° F (Water—1,000 at 60° F) = .886 Doctor Test =

Baume Gravity (A. P. I. at 60° F) = 28.2° Be. Flash Point =

*Color (Saybolt) (Standard = over 16) = Fire Test = Odor = *Copper Corrosion.

Distillation

| | Fraction | Temperature ° F | *Motor gasoline |
|---|---|---|---|
| Initial Boiling Point | 0% | 482° | |
| | 5 | 522 | 131° F |
| | 10 | 558 | |
| | 15 | 584 | |
| | 20 | 602 | |
| | 25 | 620 | 221° F |
| | 30 | 646 | |

| | Fraction | Temperature ° F. | *Motor gasoline |
|---|---|---|---|
| Initial Boiling Point | 35 | 666 | |
| | 40 | 692 | |
| | 45 | 712 | |
| Middle Point | 50 | 728 | |
| | 55 | 740 | 284° F |
| | 60 | 746 | |
| | 65 | 754 | |
| | 70 | 757 | |
| | 75 | 757 | |
| | 80 | 757 | |
| | 85 | 757 | |
| | 90 | 760 | |
| | 95 | 760 | 392° F |
| End point | 100 | 760 | 437° F |
| Distillate Recovered | | | 95% |

Remarks: ——.

Respectfully submitted.

Kansas City Testing Laboratory, by Roy Cross.

[fol. 752] Fractional Gravity Distillation Analysis of Petroleum

For Gasoline Products Co., 700 Baltimore Ave., Kansas City, Mo.

Laboratory No.: 95273.

Date: Dec. 21, 1925.

Mark: Synthetic Crude from Champlin Heavy Gas Oil.

Specific Gravity: .851.

Baume Gravity A. P. I.: 34.8.

Viscosity: 70° F. Color: —. Cold test (Flow): —. Sulphur: —.

| % | Temp. ° F | Gravity of fraction | Gravity of total over | Gravity of stream | Product |
|---|---|---|---|---|---|
| 0 | 75 | | | | |
| | 106 | | | .628 = 93.8 | |
| 5 | 142 | .628 = 93.8 | .638 = 93.8° Be. | .653 = 85.2 | |
| | 180 | | | .679 = 76.9 | |
| 10 | 218 | .679 = 76.9 | .653 = 85.2° | .702 = 70.1 | |

*U. S. motor gasoline.

| % | Temp. ° F | Gravity of fraction | Gravity of total over | Gravity of stream | Product |
|---|---|---|---|---|---|
| | 248 | | | .726 = 63.4 | . . . |
| 15 | 273 | .726 = 63.4 | .678 = 77.2° | .740 = 59.7 | . . . |
| | 300 | | | .755 = 55.9 | . . . |
| 20 | 321 | .755 = 55.9 | .697 = 71.5° | .767 = 53.0 | . . . |
| | 352 | | | .780 = 49.9 | . . . |
| 25 | 382 | .780 = 49.9 | .714 = 66.7° | .789 = 47.8 | . . . |
| | 410 | | | .799 = 45.6 | . . . |
| 30 | 433 | .799 = 45.6 | .728 = 62.9 | .807 = 43.8 | . . . |
| | 455 | | | .816 = 41.9 | . . . |
| 35 | 485 | .816 = 41.9 | .740 = 59.7 | .823 = 40.4 | . . . |
| | 506 | | | .830 = 39.0 | . . . |
| 40 | 520 | .830 = 39.0 | .752 = 56.7 | .835 = 38.0 | . . . |
| | 529 | | | .840 = 37.0 | . . . |
| 45 | 538 | .840 = 37.0 | .761 = 54.5 | .844 = 37.0 | . . . |
| | 549 | | | .848 = 35.4 | . . . |
| 50 | 562 | .848 = 35.4 | .770 = 52.3 | .852 = 34.6 | . . . |
| | 576 | | | .856 = 33.8 | . . . |
| 55 | 591 | .856 = 33.8 | .778 = 50.4 | .859 = 33.2 | . . . |
| | | | | .862 = 32.7 | . . . |
| 60 | | .862 = 32.7 | .785 = 48.8 | .866 = 31.9 | . . . |
| | | | | .868 = 31.5 | . . . |

[fol. 753]

| | | | | | |
|---|---|---|---|---|---|
| 65 | | .868 = 31.5 | .791 = 47.4 | .874 = 30.4 | . . . |
| | | | | .880 = 29.3 | . . . |
| 70 | | .880 = 29.3 | .798 = 45.8 | .886 = 28.2 | . . . |
| | | | | .893 = 26.9 | . . . |
| 75 | | .893 = 26.9 | .804 = 44.5 | .899 = 25.9 | . . . |
| | | | | .905 = 24.9 | . . . |
| 80 | | .905 = 24.9 | .810 = 43.2 | .913 = 23.5 | . . . |
| | | | | .921 = 22.1 | . . . |
| 85 | | .921 = 22.1 | .817 = 41.7 | .934 = 20.0 | . . . |
| | | | | .946 = 18.1 | . . . |
| 90 | | .946 = 18.1 | .824 = 40.2 | | . . . |
| 95 | | | | | . . . |
| 100 | | | | | . . . |

Remarks (over): ——.

Roy Cross.

PLAINTIFF'S EXHIBIT D

Error in numbering by stenographer.

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PLAINTIFF'S EXHIBIT E

Telegram marked but not offered.

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STIPULATION RE PLAINTIFF'S EXHIBITS G, H, I, K.

In the above entitled cause it is hereby stipulated and agreed that the exhibits designated as Plaintiff's Exhibit G, Plaintiff's Exhibit H, Plaintiff's Exhibit I, and Plaintiff's Exhibit K, be omitted from the printed record and [fol. 754] that the identical exhibits be transmitted with the printed record to the Circuit Court of Appeals for the First Circuit.

Verrill, Hale, Booth & Ives, Attorneys for the Plaintiff. Bradley, Linnell & Jones, Attorneys for the Defendant.

October 28, 1929.

The foregoing stipulation is hereby approved.

John A. Peters, United States District Judge.

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PLAINTIFF'S EXHIBIT J

Omitted in numbering.

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PLAINTIFF'S EXHIBIT R

Western Union Telegram

Received at W. U. Bldg. 7th & Walnut Sts., Kansas City, Mo., 1926 Feb 8 P M 3 00.

AA715 15.
New York NY 8 340P.
P C Keith Jr. 1581.

Gasoline Prod Co Inc 700 Baltimore Ave Kansas City Mo Arriving Kansas City Wednesday will proceed to Enid on Thursday to assist you in Champlin negotiations.

T. E. Scofield.

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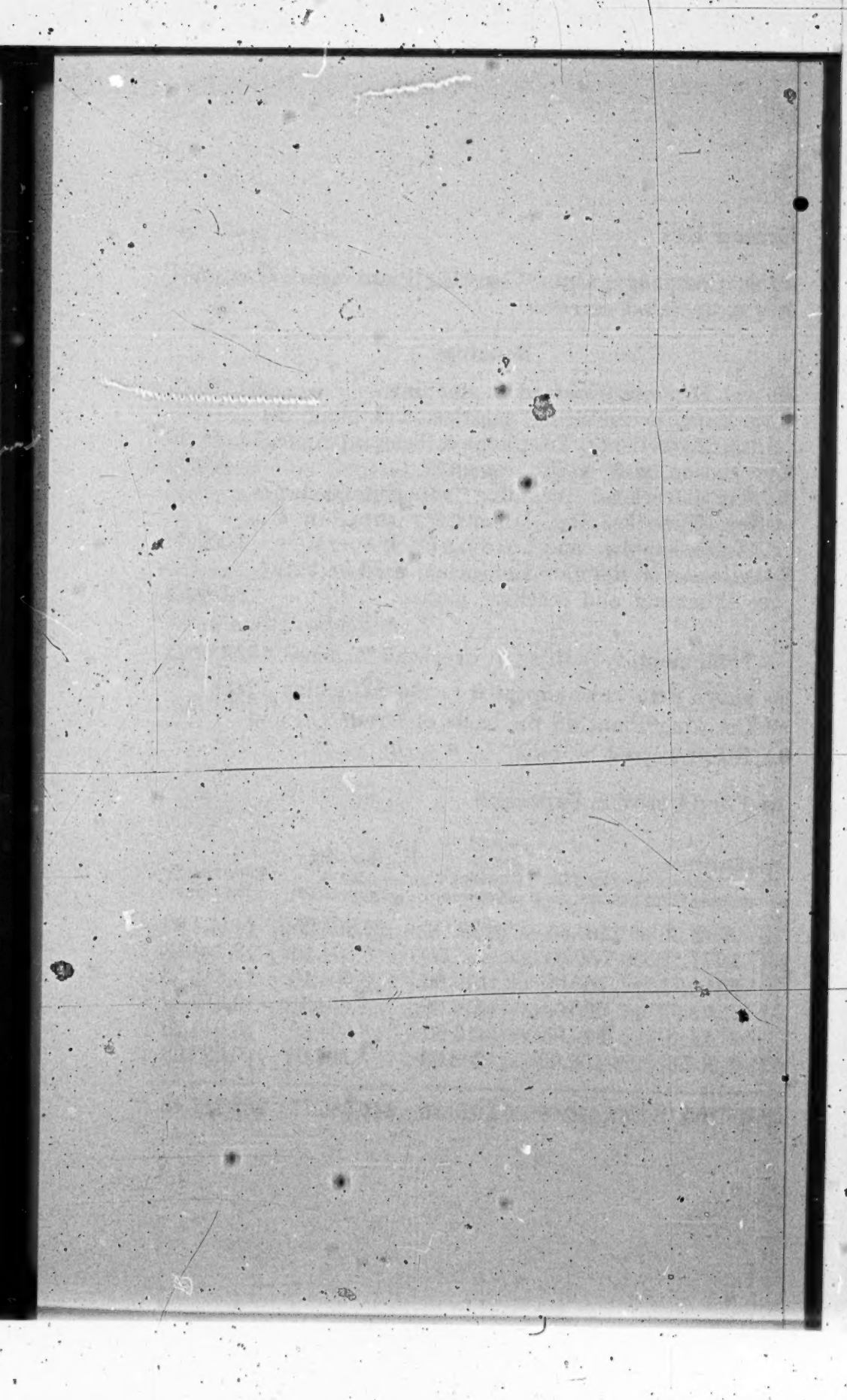
(Here follows Plaintiff's Exhibit U, side folios 755 and 756)



[fols. 755 & 756] PLAINTIFF'S EXHIBIT U

Fixed and Overhead (or Indirect). Expenses of Champlin Refining Company's Cross Cracking Plant which continued and accrued whether plant was operated or not

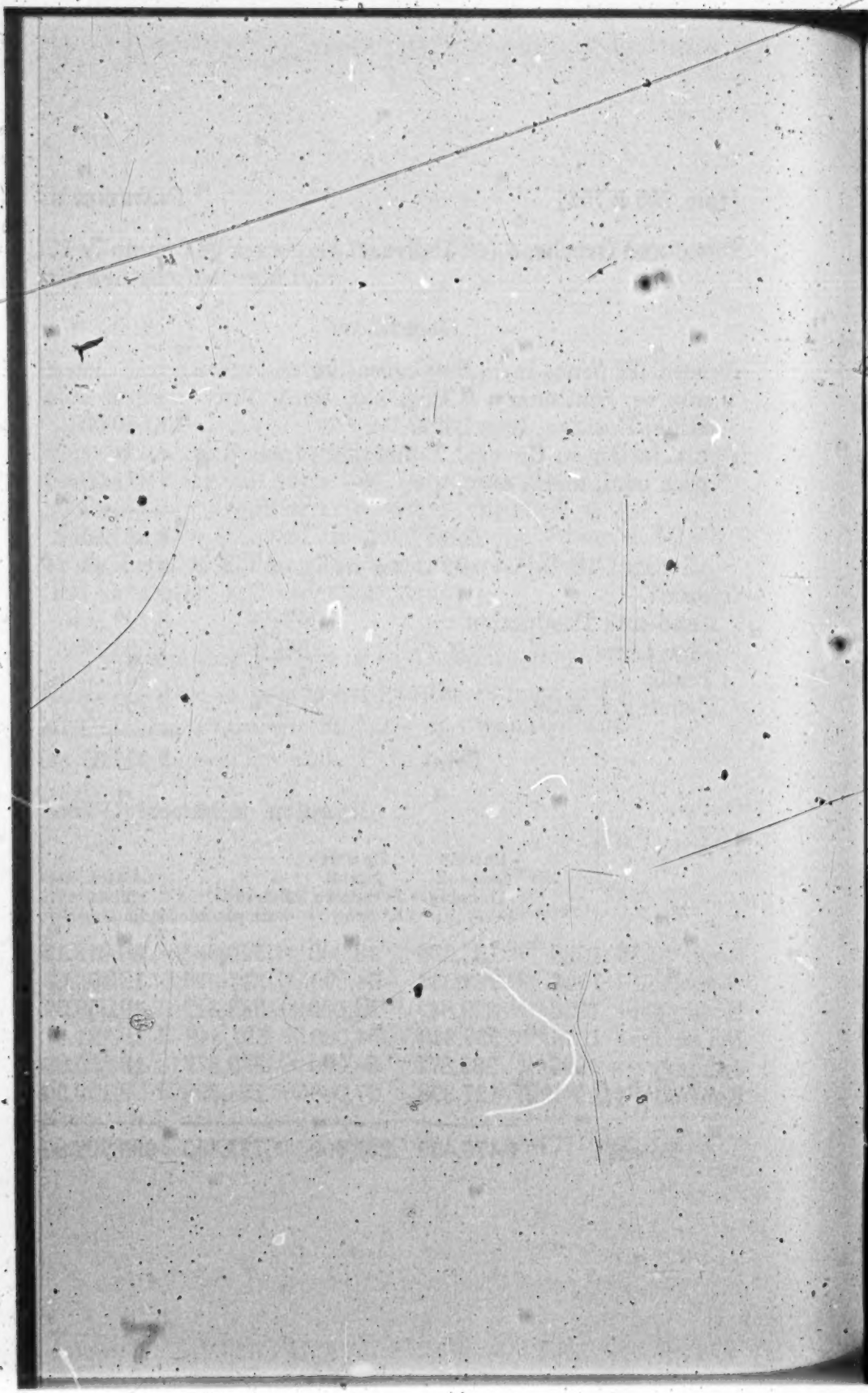
| General | | |
|---|---|---|
| General Expense including executive and office salares, Stationary & Printing, Rent, Travelling, Postage, Legal, etc. | | $8,550.00 |
| Depreciation on General Equipment, including office equipment, auto, etc. | | 475.00 |
| Total | | 9,025.00 |
| Allocated to Departments on basis of direct labor as follows: | | |
| Land and Production | 36⅔% | 3,309.16 |
| Pipe Line | 16⅔% | 1,504.16 |
| Traffic | 5 % | 451.25 |
| Refining & Sales | 41⅔% | 3,760.43 |
| Total | | 9,025.00 |

| Refining | |
|---|---|
| General Expense allocated to Refining | $3,760.43 |
| Sales Expense including salaries, Traveling & Auto, Advertising, Telephone & Telegraph, etc. | 12,500.00 |
| Depreciation on Sales Equipment | 400.00 |
| Refining, Overhead including superintendence, Office, Time keeping, Laboratory supplies, & Salaries, supplies and Loading Rack operation | 4,350.00 |
| Depreciation on Refining Equipment used by both the skimming and cracking plants | 1,169.91 |
| Total monthly indirect or overhead Expense | 22,180.34 |

The above item to be allocated to the Skimming Plant and Cracking Plant on the basis of Crude Oil and Gas Oil processed by each.

Allocation of Monthly Fixed and or Overhead Expense

| | Barrels crude oil skimming plant ran. | Barrels gas oil cracking plant | Total barrels both plants | Expenses allocated skimming plant | Expenses allocated cracking plant | Cracking plant taxes | Cracking plant insurance | Cracking plant depreciation | Total cracking plant |
|---|---|---|---|---|---|---|---|---|---|
| Sept. 20-30, 1926 | 132,953 | 18,000 | 150,953 | $6,512.15 | $881.30 | $166.66 | $138.88 | $2,868.05 | $4,054.89 |
| October, 1926 | 263,036 | 54,000 | 317,036 | 18,403.03 | 3,777.31 | 500.00 | 416.66 | 8,604.16 | 13,298.13 |
| November 1926 | 329,842 | 54,000 | 383,842 | 19,059.57 | 3,120.77 | 500.00 | 416.66 | 8,604.16 | 12,641.59 |
| December 1926 | 337,349 | 54,000 | 391,349 | 19,121.67 | 3,058.67 | 500.00 | 416.66 | 8,604.16 | 12,579.49 |
| January 1927 | 285,877 | 54,000 | 339,877 | 18,655.88 | 3,524.46 | 500.00 | 416.66 | 8,604.16 | 13,045.28 |
| February (½) 1927 | 127,398 | 27,000 | 154,398 | 9,150.50 | 1,937.67 | 250.00 | 208.33 | 4,302.08 | 6,698.08 |
| Totals | 1,476,455 | 261,000 | 1,737,455 | $90,902.80 | $16,300.18 | $2,416.66 | $2,013.85 | $41,586.77 | $62,317.46 |



[fol. 757] IN UNITED STATES DISTRICT COURT

PLAINTIFF'S MOTION FOR DIRECTED VERDICT—Filed May 1, 1929

Now comes Gasoline Products Company, Inc., plaintiff in the foregoing cause, and moves this Honorable Court to direct a verdict in its behalf in the sum of $61,530.51 and for cause of said motion sets forth

1. That the defendant has confessed its indebtedness to the plaintiff in said amount.

2. That the defendant has failed to establish any claim or right of action by the defendant against the plaintiff.

By Its Attorneys, Taylor, Blanc, Capron & Marsh, Verrill, Hale, Booth & Ives.

Motion Denied. John A. Peters, U. S. D. J. 1 May '29.

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IN UNITED STATES DISTRICT COURT

PLAINTIFF'S REQUESTS FOR RULINGS OF LAW—Filed May 2, 1929

1. The burden of proof is upon the defendant in its counterclaim against the plaintiff.

2. There was no contract entered into between Gasoline Products Company, Inc., and Champlin Refining Company for the installation of a Cross Vapor Phase System Treating tower or towers unless an offer for such installation was made by the Gasoline Products Company and accepted by the Champlin Refining Company.

3. No offer for such installation can be binding upon the plaintiff unless made by its duly authorized agent.

4. In order that an offer and acceptance may result in a binding contract the acceptance must be absolute, unconditional and identical with the terms of the offer. It must in every respect meet and correspond with the offer; any qualification of or departure from those terms invalidates the offer. Minneapolis & St. Louis Railroad Co. v. Colum-
[fol. 758] bus Rolling Mill Co., 119 U. S. 149, 30 L. Ed. 376.

St. Louis Smelting & Refining Co. v. Nix, 101 Okla. 197, 224 Pac. 982, Sec. 5009 Okla. Rev. Stat. 1910.

5. The only offer upon which the defendant has a right to rely is the oral offer alleged to have been made in negotiations prior to the writing of the letter of February 6, 1926. Defendant's Exhibit.

6. If the defendant relies on the letter of February 6th, 1926, Defendant's Exhibit —, the terms of said letter cannot be altered or changed by parol evidence, as, for instance, to show that the letter related to three towers instead of one or that there was added to the obligations expressed a warranty that the cost of operating the tower would not be excessive. First State Bank v. S. W. Nat. Bank (Okla. 1927), 257 Pac. 388; Secs. 5035, 5080 Comp. Okla. St. 1921.

7. If you find that any contract was entered into between the parties for the installation of one or more Cross Vapor Phase System Treating Towers, you can find no verdict for the defendant upon its counter-claim unless you find that such contract was broken by the plaintiff without fault on the part of the defendant.

8. If you find that any contract was entered into between the parties for the installation of one or more Cross Vapor Phase System Treating Towers and find that such contract was breached by defendant then performance of said contract by the plaintiff is excused. Cosden Oil & Gas Co. v. Moss, 131 Okla. 49.

9. Upon the pleadings the defendant is not entitled to recover from the plaintiff by reason only of inducements, if any, offered by plaintiff to defendant to secure the license contract sued on, as the same are expressly waived and excluded by Clause Fifteenth of said contract.

10. Upon all the evidence acts done by Keith or Welling as agents of Cross Development Corporation cannot be imputed to the plaintiff and plaintiff is not bound by such acts.

11. Upon all the evidence the oral offer to furnish a treating tower made by Keith and Welling on January 27th, was [fol. 759] made, and understood by Champlin to have been made, on behalf of Cross Development Corporation.

## Damages

12. There is no evidence of any damage whatever having been sustained by the defendant from the plaintiff's alleged breach of the alleged contract for the installation of treating towers.

13. "Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered as arising naturally, i. e., according to the usual course of things, from such breach of contract, itself, or such as may reasonably be supposed to have been in the contemplation of the parties, as the probable result of the breach of it." (Hadley v. Baxendale, 9 Exch. 341.)

14. In the absence of special circumstances communicated to the party to be charged at the time of making the contract anticipated profits prevented by the breach of a contract are not recoverable in the way of damages for such breach. (Howard v. Stillwell & Beiree Mfg. Co., 139 U. S. 199.)

15. Upon all the evidence, no special circumstances were communicated to the plaintiff by the defendant at the time of making of the alleged contract for furnishing a treating tower or towers which would permit the recovery of anticipated profits for the breach of such a contract, if made.

16. Mere knowledge on the part of the plaintiff of the purpose for which the treating tower was to be used would not be the basis for recovery of anticipated profits (from the entire cracking plant and the treating tower) unless the jury finds that the defendant reasonably believed that the offer of the plaintiff contemplated the assumption of liability for the loss of such profits if the offer were accepted and not performed. (Globe Ref. Co. v. Landa Cotton Oil Co., 190 U. S. 540; Pennypacker v. Jones, 106 Penn. St. 237.)

17. Damages recoverable for breach of contract must be the direct and proximate result of the breach.

[fol. 760] 18. Damages are not recoverable if uncertain, speculative, contingent or conjectural.

19. The defendant cannot recover damages for any loss which he might reasonably have avoided.

20. On all the evidence defendant has failed to prove that it sustained any loss as a proximate result of plaintiff's alleged breach of contract.

21. Defendant has failed to prove what profits would have been realized had the alleged contract been performed.

22. Defendant's Exhibit No. 61 bases the price of gasoline on the market price of a different product from that actually produced and fails to allow for many necessary expenses necessarily incurred in producing the gasoline, including all overhead expense and loss and expense required to treat the gasoline.

23. Defendant has failed to prove the profits actually realized from the gasoline manufactured with the cracking plant and cannot recover damages in excess of the profits actually realized.

24. Upon all the evidence defendant could have avoided the alleged loss by methods and apparatus readily available and in common use and its loss, if any, resulted from its failure to adopt such methods and apparatus.

25. Defendant is not entitled to damages for loss resulting from the fall in market price of gasoline in 1927.

26. Interest is not recoverable upon unliquidated damages, the only kind of damages claimed in this cause.

Sec. 2848 Okla. Rev. L. 1910
17 Corpus Juris p. 18, sec. 137
8 Ruling Case Law, p. 533, sec. 86
Mansfield v. R. R. Co., 114 N. Y. 331
Mowry v. Whitney, 14 Wall. 620
Thorndike v. Memorial Ass'n., 146 Mass. 619
Great North. Ry. v. P. & R. Co., 242 Fed. 799

By Its Attorneys, Taylor, Blanc, Capron & Marsh, Verrill, Hale, Booth & Ives.

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[fol. 761] IN UNITED STATES DISTRICT COURT

INSTRUCTIONS REQUESTED BY DEFENDANT—Filed May 2, 1929

1. If you find that the plaintiff made an offer to the defendant, to give defendant a Cross vapor phase treating

tower royalty free, in consideration that defendant would purchase of the plaintiff two Cross cracking units, and that it was understood between the parties that a treating tower meant such towers as would be sufficient to take care of the capacity of said two Cross cracking units, and that said offer was duly accepted by the defendant, then I instruct you that a contract was entered into binding on the plaintiff to erect for the defendant a Cross vapor phase treating system sufficient to take care of the capacity of the Cross cracking plant, and plaintiff is liable for all the natural and consequential damages suffered by the defendant by reason of plaintiff's failure to erect said treating towers in the time contemplated by the parties.

2. If you find that there was an oral offer made by persons whom you find to be agents of the plaintiff and made in behalf of the plaintiff, and that such offer was accepted by the defendant, then the fact that the plaintiff, through any representative, had a change of mind on account of any question as to the efficiency or economy of the treating towers or as to the legal right to use them would be immaterial.

3. If you find that an offer was made in behalf of the plaintiff to the defendant, by parties representing the plaintiff or who, from all the evidence, you find the defendant was entitled to believe did represent the plaintiff, and such offer was accepted by the defendant, you will find that the minds of the parties met and that a contract was made.

4. In determining whether or not there was an offer by agents of the plaintiff made on behalf of the plaintiff and an acceptance by the defendant, it is proper for you to consider the subsequent actions of the parties with respect to the subject matter of any such offer and acceptance, including the written communications between the parties.

[fol. 762] 5. In considering the omission of the plaintiff to cause to be erected the treating towers, you are entitled to consider what motives directed it in such course, and in considering such motives you are entitled to give due weight to the evidence with respect to the question of efficiency and economy of operation of the Cross treating towers and the question of the legal right to install and use the same, and also such facts as you find with respect to the sub-

sequently shown relationships between the Kellogg Company and the Gray Processes Company.

6. If you find that the parties entered into a contract for a vapor phase treating system to go with defendant's cracking plant, and that the plaintiff failed to perform the conditions in said contract by it to be performed by failing to erect the vapor phase treating towers, then the defendant is entitled to recover such damages as are the natural and probable consequence of plaintiff's breach of contract.

7. If you find for the defendant, in accordance with the instructions previously given you, I instruct you that defendant is entitled to recover all the damages which are the natural and probable consequence of plaintiff's breach of contract, and all damages which the parties should reasonably anticipate would result from a breach of contract by the plaintiff, and in this respect I instruct you that the defendant would be entitled to recover all the profits which it lost by reason of plaintiff's breach of contract, if you find that profits were in the contemplation of the parties when the contract was entered into and that the profits claimed are not remote nor speculative but are capable of reliable measurement, that is, can be ascertained by you with a reasonable degree of certainty.

8. If you find for the defendant in accordance with the instructions previously given, I instruct you that the defendant is entitled to recover from the plaintiff the profits that it would have realized if the plaintiff had erected for the defendant a Cross vapor phase treating system to operate in conjunction with defendant's cracking plant from the time when the cracking plant was finished and [fol. 763] ready for operation to the time that defendant had erected and put in use its own treating towers, provided, you find that said profits were in the reasonable contemplation of the parties at the time of entering into said contract, that they are not remote nor speculative and can be ascertained by you by calculation with a reasonable degree of certainty.

9. If you find for the defendant in accordance with instructions previously given you, I then instruct you that defendant is entitled to recover for the loss of all profits by it sustained by reason of plaintiff's breach, if you find that

profits were in the reasonable contemplation of the parties at the time the contract was entered into, that they are not remote nor speculative and can be by you ascertained by calculation with a reasonable degree of certainty.

10. If you find for the defendant in accordance with instructions previously given you, and find that the defendant is entitled to recover for loss of profits sustained by it in accordance with instructions previously given you as to when profits may be recovered, I then instruct you that the defendant is entitled to recover the profits which it would have made if plaintiff had given defendant what it agreed to, from the time the treating towers should have been erected by the plaintiff up to the time the defendant should have erected its own treating system to replace that which plaintiff failed to erect, together with interest on those profits from the date plaintiff was first apprised of defendant's claim to the present time, plus the extra expense incurred by the defendant in erecting treating towers of its own, together with interest on the cost of said towers from the date when plaintiff was first apprised of defendant's claim.

11. If you find, in accordance with instructions previously given you, that the defendant is entitled to recover for loss of profits, I then instruct you that it is entitled to recover its loss of profits sustained from the 20th day of September, 1926, when the cracking plant was finished and ready to op- [fol. 764] erate, up to February 23, 1927, when defendant finished construction of its own towers, together with interest on that amount to April 25, 1929, plus the cost of erection and installation by the defendant of its own treating towers, and interest on said amount from May 1, 1929.

12. In considering the question of profits and in that connection whether profits were in the contemplation of the parties at the time they entered into any contract, if you find they did, it is proper for you to consider the representations made by Mr. Harcourt and by Dr. Cross in their respective letters, if you find they were brought to the attention of the defendant before any contract was actually entered into and relied upon by the defendant.

13. If you find for the defendant, but you find that defendant is not entitled to recover its loss of profits in accordance

with instructions previously given you, because said profits were not in the contemplation of the parties or are remote and speculative and cannot be by you reasonably ascertained, I then instruct you that defendant is entitled to recover a depreciation on its cracking plant in such amount as you find the evidence warrants, interest on the cost of the Cracking Plant, cost of its own treating towers and interest thereon.

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IN UNITED STATES DISTRICT COURT

DEFENDANT'S MOTION TO AMEND AMENDED PLEADINGS—
Filed May 2, 1929

Now comes the defendant in the above entitled cause and asks leave to amend its amended plea of set-off or counterclaim by striking out the article "a" preceding the word "Cross" in lines 19 on page 2; 9 on page 3; 14 on page 3; 12 on page 4; 29 on page 8; 4 on page 9; and 10 on page 10; and by striking out the word "tower" and inserting in place thereof the word "towers" in lines 20 on page 2; 10 on page 3; 15 on page 3; 10 on page 4, 13 on page 4; 14 on page 4; [fol. 765] 29 on page 8; 5 on page 9; 7 on page 10; and 10 and 11 on page 10.

Champlin Refining Company, by its Attorneys, McKeever, Moore & Elam, Harry O. Glasser, Bradley, Linnell & Jones, Beane & Beane.

Motion Denied. J. A. P.

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IN UNITED STATES DISTRICT COURT

CHARGE TO JURY

By the Court: Gentlemen of the jury, you have listened patiently to all the evidence in this long and somewhat complicated case, and I know you are desirous of accomplishing a just and correct result; and it is my duty at the present time to assist you to that end by instructing you as to the rules that apply to this case, by reviewing the evidence and giving you an opinion upon the evidence if I

see fit to give one, and by calling your attention to salient points in the evidence and analyzing for your clearer understanding, so far as I am able to do so. And when I speak of having the idea of giving you an opinion, I simply mean in the course of my analysis of the evidence I may appear to express an opinion, but our functions—yours and mine—are totally distinct. My duty, essentially, is to instruct you as to the rules of law and your province entirely is to decide questions of fact. So if I do appear to interfere with your prerogative and express my opinion as to any of the facts of this case, please give it only such weight as you think it is worth, and remember the responsibility is entirely upon you as to matters of fact.

There is one point of law that you should bear in mind throughout the case, and that is that the burden of proof is upon the party setting up a proposition; and in this case, somewhat unusually, it is on the defendant, because the suit is in favor of the Gasoline Products Company against [fol. 766] the Champlin Refining Company and there is no dispute between the parties as to the amount due on the plaintiff's writ which is the sum of $61,000 I believe. The real controversy comes upon an account in set-off, or counter-claim, so-called, that has been brought into court in reply to the plaintiff's writ, by the defendant, which says that it is true that the defendant owes the plaintiff this $61,000, more or less, but on account of the breach of a certain contract which the defendant claims to have that the plaintiff—I mean the defendant—has been damaged in a sum of money in excess of the amount in excess of the amount due the plaintiff; and that is where the dispute comes between the parties, and that is where you come in, and you, as a constitutional part for the time being of this court, have the responsibility of settling that dispute and deciding the facts in this case.

Now it is necessary, in order to get a background for this case—and I intend to eliminate almost all of the details, and, so far as I can, all the irrelevant details and confine our conference here—you may call it that—to the important and salient points which I think shouldn't be overlooked and which I think should get you to a proper decision in the matter. And I am sure it is your earnest desire, as it is mine, to arrive at a just and proper result here. There has

been some suggestion on the one side or the other of the standing and the situation—possibly the financial affairs surrounding these parties—some of the witnesses possibly. Now, that doesn't have anything to do with this case. When parties come into this court, gentlemen, we don't know or care whether they are rich or poor; whether they come from Oklahoma or Maine, or whether they are engaged in this business or that. Your sole consideration is to do exact justice between the parties, and I am sure that I make no mistake when I say that.

Now, as I say, in order to get the background for this dispute, so we can analyze it and more intelligently decide it, I will review briefly the situation which the parties have presented to us.

We find that Mr. Champlin, who is the head of the Champlin Refining Company,—I may use the terms interchange- [fol. 767] ably—was in need of addition or improvement on his plant down there in Oklahoma, he having what is called a skimming plant, and desiring to add to it some kind of a cracking plant, and he was solicited by agents who had cracking plants to sell. Especially he was solicited by Mr. Keith, who had this Cross cracking plant to sell. Now, what was in the minds of the parties which was the object of their negotiations? Well, it seems there were two things. It seems there was this cracking plant, and there was an adjunct to this cracking plant called the vapor phase treating system, which was to treat the gasoline after it had passed through the cracking process and make it more valuable, or more marketable, as I understand it; I don't know exactly, but it was some benefit and advantage to have a treating process, without any question.

Now, what was this treating process? Well, it seems that that Cross treating process was nothing more than an idea. It was born in the mind of Dr. Roy Cross, an eminent chemical inventor in this line of business. It was experimented upon in his laboratory and drawings and samples of it were made which were sent down to Washington to the Patent Office, and the patent was granted upon it. And that is the so-called vapor phase treating process, as I understand it. I think the patent doesn't call it a process, but calls it a product, because under the technicalities of their procedure, it seems, the thing that they had patented was the mixing of this copper with the clay, and that fea-

ture differentiated this particular Cross treating plant from any others and was why, I suppose, that Dr. Cross was able to get a patent upon this idea.

The cracking plant was another affair, well known in the trade, doubtless the subject of patent also, but also the subject of commercial use, whereas it seems that this vapor phase treater had never been in commercial use; nobody had ever had, and nobody up to now—as I understand it—has ever put in commercial use the Cross vapor phase treating tower. They may have come pretty close to it. This man Gray may have something pretty close to it, but he doesn't have the actual thing, because, as I understand it, there has never been erected or put into commercial use [fol. 768] any one of the so-called vapor phase treating towers of the Cross brand, so-called. So the subject matter of the negotiations between the parties there was, first, a cracker, or whatever they call it—cracking system—cracking unit—and a vapor phase treating system as an adjunct.

We must be careful to differentiate in the testimony of the parties these two subject matters of their negotiations, because unless we do I feel we will not do justice in this case, and I will tell you why as we go along further. It is true that the first question in this case to be decided is whether or not there was a contract between the parties, but right there I want you to bear in mind and make a definite distinction between the contract for the cracking plant and the contract for the treater, because, as I understand it, the position of the Champlin Company is, and I may say parenthetically, that it is plaintiff and defendant, because in this case the defendant Champlin was practically the plaintiff, he is making a claim against the Gasoline Products Company; the Gasoline Company, plaintiff in the first writ, is practically the defendant in the controversy we are having. So to avoid confusion, I will try to keep them apart, the Champlin Company and the Gasoline Company, the Champlin Company being the company now making the claim against the Gasoline Products Company and having the burden to establish the correctness of its claim, to your satisfaction, and contending here, as I say, that they made a contract. Well, now they claim that they made a contract, one contract comprehending both the cracking unit and the treating arrangement. The other party, the Gasoline Products Company, claims that they made a con-

tract covering the cracking plant, but that as to the vapor phase treating system the most they gave was an option on it, a right to the Champlin Company to have that in case after investigation they wanted to have it and use it, and certain terms were agreed upon in case Mr. Champlin's Company desired to take advantage of that option as claimed by the Gasoline Company.

[fol. 769]. So when you begin a discussion of the case, bear those two positions in mind, because it may be that a good deal of the testimony is consistent with both propositions. That is, the Champlin Company might have in its mind one idea and had a contract for both of those things, and the Gasoline Company might have in their mind with equal honesty the idea that they made a contract for the cracking plant but only gave them an option on the treating plant. So bear that idea in mind at the very start.

Now it is claimed by the Champlin Company, and it is up to them to prove their claim, as you know, by what I have said about the burden of proof, that they made a contract on a certain day which would entitle them to this cracking system and to the vapor phase system as adjunct to it. Now it is necessary for you to know, because you have got to decide this question, whether there was a contract between the parties,—it is very necessary for you to know at the outset what I mean when I say a contract and what the parties refer to when they use the term contract.

That means perhaps what you and I understand in every-day affairs, to be an agreement between the parties to do something; it means that two parties must come together in an agreement; their minds must meet, as the lawyers say, over one complete proposition. I might offer you, Mr. Foreman, to sell you a horse for $200, and you might come back and say you would accept my offer if I will guarantee that he would trot in two-ten; there would not be any contract without our minds having met. If you say, "Yes, I will take your horse for $200," then our minds would have met then and there, and it would be a contract. I would have agreed to sell and you would have agreed to buy.

Now that is just as true of a complicated affair as it is the simple affair like a horse trade, and in considering this matter of whether there was a contract between the parties we have got to put our finger upon one particular time when

the minds of the parties met, and one party agreed to sell and the other agreed to buy.

[fol. 770] Now the Champlin Company has stated and restated their position upon the theory that the minds of the parties met on one contract for both these apparatuses on or about the 6th day of February, either the 5th or the 6th of February, 1926, as I understand.

As I understand their claim, they do not claim there was any contract made unless it was made early. On the 5th or 6th of February, 1926. There is a written paper called a letter of February 6th which in its form appears to be a proposal, and offered for the proposition, as you will see, but there have been so many phases of this case before, and everybody agrees now that that is in any term technically a proposition, but that is simply an outline or memorandum of an oral arrangement just then or just previously made between the parties, and the Champlin Company's position is that that was the terms of an oral contract which comprehended the treater, entered into on the 5th day of February, 1926, and it is for you to decide from the evidence on both sides which party is right as to whether they did make that trade for the treater, not the cracker, on or about the 5th or the 6th of February, and I have here a very brief summary of the evidence, or the testimony, I should say, on each side relative to that particular point.

There are steps in this case, as you go along and as you will see, I cannot tell how many steps you are going to find. The first one is for you to decide whether or not there was any contract between the parties. If there is not any contract, why that is the end of the case, so far as you are concerned. But I do not know what you are going to say about that, so I have got to continue and analyze the whole case right straight through, damages and all, so that you may have the whole situation in front of you when you go to your room.

Now, as I say, the first thing to consider is whether or not the minds of these parties met on or about the 5th or the 6th of February, 1926. Well, we have the evidence of four people about that, as I understand it. We have Mr. [fol. 771] Champlin's testimony in detail, giving his version of and embracing his claims, and then we have the testimony of three men who take a somewhat contrary position, Mr. Welling, Mr. Keith and Mr. Harvison. They did not all together have any conversation with Mr. Champlin, but two

out of those three had several conversations with Mr. Champlin, and we have the benefit of their statements of what happened at those times, and it seems to me that from that testimony you have got to decide whether there was a contract between the parties, except that you may consider, and properly should, the situation of the parties, their subsequent actions and activities, the letters and telegrams that passed between them, as bearing on the probability one way or the other, as to there being a contract between them, because if there was a contract between them they act one way, and if there was no contract between they they would naturally act another way, under certain circumstances.

Now let's see what the testimony is of these three men. Here is Mr. Champlin's version of the affair, embracing the situation, where we must find, if at all, a meeting of the minds of the parties. I do not assume to give it, except in a brief summary.

It seems Mr. Champlin was first approached in March, 1925, by a man named Harcourt who talked cracking towers and talked about treating towers, but nothing came of those conversations, and after Mr. Harcourt as an agent to sell one or both of these produets was Mr. Keith who appeared in the fall of 1925, and more often in January, 1926, and there is no question that in January, 1926, Mr. Keith offered to Mr. Champlin the cracking plant and the Cross tower free of royalty. Now those were two separate propositions, as I understand it, and undoubtedly the offer of a treater free from royalty was used as an inducement to persuade Mr. Champlin to buy the cracking tower. It is evident that the profit in this thing was in the cracking tower. Undoubtedly the desire of the parties was to sell the cracking tower, and that is where the money was. It involved a large amount of money, over four hundred thousand dollars. Apparently there was no profit in the treating [fol. 772] tower because it was offered royalty free, and they were to get back in any event only the cost of setting it up, but the idea was, as I understand it, it was considered advantageous to the Gasoline Company to have a commercial installation of this tower, and they had a high opinion of Mr. Champlin's business ability and the plant, and they thought it would be a very good thing for them if they could

have an installation of this treater in connection with Mr. Champlin's cracking plant if he bought it.

So each side had an inducement there to carry out an arrangement whereby Mr. Champlin should have a cracking tower and if he wanted it, a vapor phase treater. Well, anyway, there is no doubt, there is no question in my mind, nor probably in yours, that whoever owned this treater was quite willing an offer should be made to Mr. Champlin.

There has been a question of agency raised here as to whether or not there was actually any authority in Mr. Keith who was the active intermediary to make a contract with Mr. Champlin, but, as I say, it is apparent from the testimony and from the letters, that not only was the Gasoline Company perfectly willing to have an offer of this plant made, but they were preparing to put up $25,000 to have it made, have it installed, which they were supposed to get back under certain circumstances. They would get some benefit out of having it operated, and there was a letter written from the owner of the patent, this owner being the Cross Development Company, not the Gasoline Company, which outlined very much the same proposition that Mr. Keith subsequently made to Mr. Champlin, and which Mr. Champlin says he on a date accepted. I shall not go further into the question of agency. It is, of course, a matter for you. If you find there was no authority in Mr. Keith from the Development Company, the owner of this patent, to make this arrangement claimed to have been made, why then there would not be any legal contract, but I say frankly that I think it is probable on account of the [fol. 773] interrelations of these corporations that these corporations and their officers, on account of the letters, on account of what they had to sell, on account of what they must have known afterwards, I think it is probable that you will not stumble at that step, but will probably find that there was authority to make an arrangement with Mr. Champlin touching this treater, if there was any arrangement made, and that is all I shall say about the matter of agency.

Now I have got to the fact that Mr. Keith had made the offer and that I thought the offer was in accordance with the desire of all parties. Then in January, 1927, Mr. Keith

got Mr. Welling to go with him to Enid, Oklahoma, which is the place where this oil business is carried on, and Mr. Welling testified. Now this is what Mr. Champlin said. I am now giving you Mr. Champlin's version of the affair. I will give Mr. Welling's in a minute. Mr. Champlin says that Keith and Welling came there the 27th of January, and they made offers of the Cross treater if he would purchase the cracking plant and have the Kellogg Company erect it.

The terms of the contract were February 6th. The talk was practically—except there is a dispute—there is a difference here between the parties as to the number of towers that were to be installed if the parties finally came to a conclusion. It is evident that in the written paper which I have called the outline of the arrangement that the parties may or may not have entered into, it was originally a proposal anyhow, in that outline or proposal one tower only was referred to. That is, a tower was referred to, and another element in the case, a tower and not towers was referred to, but Mr. Champlin says that oral arrangement when they talked it over and made it was three towers. There is other testimony that it was possibly two towers. I do not believe this matter of so much importance that we can split hairs. Probably you will not make much distinction as to whether there was one tower or two towers or three towers.

The large point in the case is whether there was any agreement for any towers, and I think for the moment we [fol. 774] can neglect the fact, neglect the necessity of finding, whether there were one, two, or three. Mr. Champlin claims that if there was any contract, it was for three, as I understand it, and he rests his case, I believe, on the claim that there was a contract that he made orally for three towers, even if the proposal was limited to one. The proposal is not the contract. He says he made a contract separately, and that was supposed to be an outline.

Well, I have digressed a little. I am saying now that Mr. Champlin says that Mr. Welling and Mr. Keith came down there and proposed to him to buy the treater and to buy the cracker; that they offered him one with the other, and that they offered the treater as an inducement to him to buy the cracker.

The matter of the Gray infringement comes up at that meeting, as I understand it, and the fact that that infringement matter came up was the reason that on February 1st Mr. Schofield of Kansas City appears on the scene, he being a patent lawyer, and his mission being to convince Mr. Champlin that this matter of the Gray infringement was a bugbear, that there was nothing to it, that if he should take this treater, he would not be subject to an infringement suit by Gray. That was all in line with trying to get Mr. Champlin to buy the cracking plant and with it take the treater. There is practically no disagreement between the parties as to that.

Mr. Schofield did come on February 1st, and he did talk about the patent. Whether he convinced Mr. Champlin or not, I don't know. He tried to.

Mr. Glasser: If your Honor please, I think that testimony of February 1st was subsequently corrected to February 12th.

The Court: I guess it was later on. That may be true.

I do not regard the Schofield incident as so very important, except the fact that he was brought down there to quiet any doubts in the minds of the parties concerning the validity of the Cross patent.

[fol. 775] I am giving Mr. Champlin's story. Now it seems, Mr. Champlin goes on to say, that on February 5th Mr. Keith and Mr. Harvison came down. Mr. Harvison, as you know, is the vice-president of the Kellogg Company, and Mr. Welling was the vice-president of the Gasoline Products Company. But it is hopeless for either you or me to try to carry the distinction between the offices held by these gentlemen. That is too fine a detail, I think, for us to bother much with. I think we shall have to take up the other points in the case. They were all more or less connected, as you know.

Mr. Keith and Mr. Harvison having arrived there on the fifth, the three contracts were drawn up, and the letter of February 6th, which was the outline of this proposition on the treater, was presented. Mr. Champlin says he told them, that is to say, told Keith and Harvison, that he was now willing to go ahead—and I am quoting now this testimony—willing to go ahead and buy the Cross cracking

plant and to take the Cross vapor phase treater. "I told them and we agreed that they would go ahead that afternoon and draw the contracts."

That is where Mr. Champlin claims the minds of the parties met, and he had an agreement with these gentlemen to sell him the cracking plant and to sell him with it a vapor phase treating system. On that day they drew the contracts, went into a room, got a stenographer, and drew the contracts; but they drew only three contracts, as you know, relating wholly to the cracking plant. They drew one, this letter of February 6th, not signed by Mr. Champlin, affecting the treater.

Now Mr. Champlin goes on to say that on the 26th of February Mr. Keith appears again with the contracts signed. They were later somewhat changed to meet the agreements of the parties in regard to these changes, and they were finally delivered.

The delivery of these contracts did not especially affect the letter of February 6th, because that was unchanged. The contracts were changed. The letter of February 6th [fol. 776] remained as it was and never was signed by anybody except the man who wrote it, Mr. Keith, but it did accompany these three contracts.

There are also letters and telegrams later on, affecting this matter, which you have in evidence and which you will consider as having a bearing upon this claim that Mr. Champlin on that day came to an agreement with Mr. Keith to buy two things,—one, the cracking plant, and, two, the treater to go with it.

Now, then, what do these men say about it? Well this is what Mr. Welling says. All these men are somewhat interested, so far as that is concerned. But I think we must rely upon the very fair statement, made by both counsel, that there is no reason to question the sincerity and intent to be frank on the part of all of these witnesses. To be sure, they all may have more or less financial interest. Mr. Champlin is the interested party in the suit. These other people have interests, directly or indirectly, in the result, in the royalties, or in this claim, or in this, that or the other, but I think we can dismiss that from our mind, because these witnesses have all appeared to be candid. Our best theory to follow is to reconcile their testimony, if we can, and see what it is consistently—see what theory it is

most consistent with—giving each party credit for trying to tell the truth as he understands it and remembers it. No witness can remember all the details. Any witness who claimed to remember all the details I should distrust. They have all done the best they could to give us their version of the facts. I am going now to give you, briefly, the testimony of these other three men, who testified on this same point, as bearing upon whether this alleged contract was a contract—whether the minds of the parties met.

Now Mr. Welling says that he was there January 27th with Keith, just as Mr. Champlin says; that he told Mr. Champlin that the Cross Development Corporation would license the use of the treater free, if a first installation. He is the first man that makes the additional point, that it should be free if Mr. Champlin was the first man who installed one. He wanted to get him going quickly, on this [fol. 777] matter and have it in commercial us as soon as possible.

Litigation was talked of, and, of course, in that contract which was drawn a few days afterwards it is mentioned. The result of the litigation was to be in a way decided as you will see. I believe by that memorandum the lawyers' fees and costs were to be paid by the owner of the patent in case of any litigation concerning it, and of course that left the damages, if any, to be met by the other party who was using the patent. That is just an incident in the contract.

Mr. Welling says that as he recollects only one tower was talked of, and, of course, as we know by the memorandum, it was to be paid for only if it was successful, and that he hoped it would work. There were no calculations made on the cost of operation. He had no further conference with Mr. Champlin at all. Mind you, he was there January 27th. It is not claimed, of course, that Mr. Champlin closed the contract then. They talked about the matter, and Mr. Champlin knew from Mr. Welling that he could have this treater if he wanted it. Mr. Welling says he never was informed, he personally was never informed by Mr. Champlin, that he would accept the terms that were talked of on January 27th. That is the end of this testimony. That is the substance of his testimony on that question of the meeting of the minds.

Now we have Mr. Harvison's testimony. He made a trip down there. He made the critical trip on February 5th.

He was there February 5th and February 6th. That is Mr. Harvison's testimony. You remember of seeing Mr. Harvison and remember what he said and how he appeared. He said they arrived—he and Mr. Keith arrived—and Mr. Champlin said he was not ready to close, and Mr. Harvison started to go back on the theory that he had been brought down there on a tomfool errrand. You remember that fact. He started to go out. I am giving Mr. Harvison's testimony. Mr. Champlin says, "Let's talk it over some more." They did. He came back and they did talk it over, and they had [fol. 778] this conversation in regard to the contracts and the cracking plants.

He says he told Mr. Champlin, as he had told Mr. Champlin's manager, Slater in New York, that the Cross treating process was a laboratory experiment only, and suggested complications with Gray if the Cross treater was used. According to his story, and he was frank about it, he had a further discussion after lunch. You remember the incident of his giving the Marland contract to Mr. Champlin to look over and he not having time to look it over. He says Mr. Champlin told him to prepare the contracts, meaning the three that were to be drawn up. The terms of payment were discussed. Champlin told him that he hadn't made up his mind what to do regarding treaters.

Now there is a distinct statement that Mr. Harvison makes in his testimony. You recall that it has now come to a point where there is a distinct clash between the memories of Mr. Champlin and Mr. Harvison. Mr. Champlin says that at that very time, in that very conversation he had with these two men, he told them he would take both the treater and the cracking plant and to draw up the contract. Harvison testifies that Mr. Champlin told him to prepare the contracts in regard to the cracking system, and they did; they went out and prepared the contracts in regard to the cracking system, and the letter was drawn up, as well, in relation to the treater. He says that Mr. Champlin told him he had not made up his mind what to do regarding treaters. Now, if that is true, if that is a correct statement, Mr. Champlin had not met the minds of the other party in relation to the treaters, but had in relation to the cracking system. He explained this further by saying that Mr. Champlin said there was plenty of time in regard to the

treater for making up his mind later on, about sixty days or something of that kind. He says he has no recollection of seeing the letter of February 6th. He took part in the rewriting of the contracts on the cracking plant and later received them signed. According to his testimony, no contract had been closed with him or with his knowledge, as to the treating plant, on that day.

[fol. 779] Now Mr. Keith's testimony is more fresh in your minds than that of Mr. Welling and Mr. Harvison, and I won't give it in so much detail as I have mentioned theirs, although he is a very important witness and relied upon as the active man in these negotiations and whatever was done in relation to the contracts.

He details the fact that he was in Enid on the 27th of January, and with Mr. Welling, and told about these treaters and put up the offer. No question about that. Both parties agree that offers were made to Mr. Champlin on this treater system. Of course, an offer is not a contract unless accepted, you understand.

He also gives his conversation of February 1st, when he was down there, and of February 5th. He details a conversation when Mr. Harvison was there on February 5th. The three met at Mr. Champlin's office. He said Mr. Champlin said he was not ready to close, and Harvison started to leave; that he later wanted to talk it over, and Harvison discouraged buying the treater on the ground of the Gray patent—that Gray might bring suit. Champlin said go ahead and prepare the contracts. They did so. Keith prepares the letter of February 6th, delivered to Champlin. Champlin said finances had not gone through and contracts could not be signed. None of them were signed at that time. Later he went back with Schofield, still trying to sell the cracking process with right to put in process for treater system.

On February 22, you will remember, he says—and this is important—he asked Mr. Champlin what the prospects were for the sale of the Cross plant. Champlin said if he had any kind of a cracking plant, the prospects looked good; his financing hadn't been completed; he didn't know whether he was going to put in a cracking plant or not. Nothing was said about a treating plant at that time.

Of course, that is inconsistent with the theory of Mr. Champlin that on the fifth or sixth he had closed the con-

tract, which meant an agreement on his part to buy and upon their part to sell.

[fol. 780] Later in July Keith testifies that after he found out about the probable excessive cost of using this treating system he talked with Mr. Champlin about it and asked him whether they should continue the matter, and on July 27th this conversation occurred, according to the testimony of Mr. Keith: a new proposition was made involving the Gray process with a discount of commission price and royalties, as you may remember according to Mr. Keith's testimony. He says he offered Mr. Champlin the Gray process in conjunction with the Cross cracking process. He offered to discount the royalty, I think, to four cents, and offered to make a discount on the price and throw in his commission, and Mr. Champlin turned it down. Keith testifies that he told Champlin that if he would accept this offer of February 6th as written, they would proceed. Champlin spoke of one tower. Keith said if you will sign we will put in three. Champlin said he understood the treatment was to be reasonable. Keith feared the cost would be high and wanted to put in towers. Champlin wouldn't accept the letter of February 6th without a reservation as to treating process. That conversation, if it occurred that way, of course is inconsistent with Mr. Champlin's idea that when he talked with him he accepted both propositions. His theory is that he accepted both. Their theory is that he accepted only the cracking system and kept open the one of treating so that he could look into the matter and say later if he wanted to take it. Now, as bearing upon that question as to whether the minds of the parties met, we have several instances, but we have also the testimony of this man Gray who testifies through the deposition. He did not appear here in person. Mr. Gray in New York, I believe, says he was present and at that time representatives of Mr. Champlin were there and the matter of a treater was brought up, in addition to some other matters, and that Mr. Champlin's agents or representatives said that they had not made up their minds yet in regard to treaters. If that is true, of course it is a very—it can't be true and be consistent with Mr. Champlin's claim that he had bought the treater, because if he had not made up his mind then he had not closed [fol. 781] the contract of February 6th. On the other hand,

if there is any mistake about that, if he was talking about something else, that is another matter; but those are things for you to consider in determining whether you think from the testimony Mr. Champlin is correct in his idea that he closed his contract for the treaters as well as the cracker on February 6th.

This matter of burden of proof is spoken of frequently on these occasions and it has value. It means that his evidence must be such as satisfies you of the truth of the proposition; not necessarily be more witnesses on one side than upon the other. It does not mean that Mr. Champlin has got to have three witnesses to the Gasoline Company's one. It is simply that the whole weight of the evidence must satisfy you on reflection of the truth of that proposition. I can illustrate it this way: that if after thinking the matter over carefully you do not know,—you say I don't know what to think,—then you must decide against the proposition, because his duty is to satisfy you. If all he can do is to cause you to say you don't know what you think, he has not met the burden of proof. That is all I can say about that.

There are a few general circumstances that I think you should consider in deciding this question as to the parties having come together in a contract relating to the treater. Nobody disputes that they came to a meeting sometime or other in relation to the cracking plant. He has the cracking plant. He paid for it. He likes it. It is a good one and everybody is satisfied and happy. The trouble is that he hasn't any treater, or he has another one that he put up himself, and he complains that these people agreed to give him one. He did not get it, and he is entitled to damages. We are talking about the first point, as to whether the parties agreed. I say there are two or three general circumstances that may throw light on this situation. One is this. You notice that these three contracts were very carefully drawn up, changed to meet the wishes of the parties, and signed by both sides. That was not done in relation to the treater other than to have this incorrect, at least in one respect, letter of February 6th prepared and delivered. It [fol. 782] is worth inquiring, of course, as to why they did not use the same care in relation to that contract as they did in relation to the others, if they really thought they had a definite and final agreement in regard to it; although of

course it is proper to say that it did not involve so much money as the cracking plant and wasn't so important an affair.

There is another point of view that I think should not be overlooked, and that is to whose advantage was it to have this contract go through for the treater. It was partly to the advantage of both sides it seems. Of course Mr. Champlin wanted some kind of a treating system. On the other hand these people who owned this patent called the Cross cracking system wanted to have a commercial installation of it, and they would like to have had Mr. Champlin operate it for them. It would be consistent with the desires and interests of both parties if the matter was left as claimed by the Gasoline people that Mr. Champlin should buy the cracking plant and have an option or right to take the other one if the found he wanted it.

Now Mr. Champlin, through his attorneys, has said that there was one incident which should cause us to put considerable reliance upon the claim for that side. When the young Mr. Koch arrived there and discovered that somebody was trying to sell Mr. Champlin a cracking system, Mr. Koch, evidently being a live Yankee, although living in the southwestern part of the country, saw a chance to make a dollar, and he was agent, or sub-agent of this same patent, of the Cross cracking system, coming around by the way of London, and he being a very enterprising young chap he cables London and gets authority to sell the cracking plant on his own account; the same plant; Cross plant; and he goes to Champlin and offers it to him at a price that would be about $110,000 less than he would have to pay these Gasoline people. Mr. Champlin says that that was one great inducement that caused him to close with the Gasoline people and turn down young Mr. Koch, who had his telegraphing for nothing. It is argued, of course, with some force on the other side that there were many features [fol. 783] in the Gasoline Company's proposal that were not present if Mr. Koch had had the transaction completed. It seems Mr. Koch apparently was not in position to make the guarantees as to performance and so on that the Gasoline Company was. We don't know. That might or imght not have had a considerable effect on the mind of Mr. Champlin; but also this should be borne in mind I think, that still

and all Mr. Champlin would get the same benefit if he made a trade with the Gasoline people on the basis of having the cracking plant with these guarantees, and the option or right to take the treater if he wanted to later, as he would if he made the trade with Mr. Koch and bought the plant at somewhat less. He would have bought at $110,000 less, but he would not have had the benefit of some of these other things. I do not know anything more to say; that is to say, I will not take the time to say anything more about this branch of the case.

By a Juror: Will you say just a word in regard to the validity of oral contracts?

The Court: I am glad you mentioned that. An oral contract concerning a matter like this is just as valid as a written contract. It is simply more difficult to prove. If the parties had had the forethought to put that in writing, as they did the contract concerning the cracking plant, we would not have had this expensive lawsuit concerning the treater; but they did not do so, and we cannot help it, and they have a right to make contracts by word of mouth, and if they are proved they are just as valid in this respect as if they were in writing. There are some documents that have to be in writing by reason of certain statutes, but this is not one of them; so you need not concern yourselves with that view of it at all.

I was saying that on this branch of whether or not there was a contract,—and this is the first important matter to be considered,—you will have to determine whether you think on all the evidence Mr. Champlin and his company has satisfied you that they came to an agreement, not only on cracking system but also on the treating system, and that is all I can say about that. If you find there was no con-
[fol. 784] tract,—no legal contract as I described it; no meeting of the minds of the parties on both propositions; if you find that was not so, or you are not satisfied that it was so, then that is the end of the case so far as you are concerned, and your verdict would be that the plaintiff recovers the sum of $61,000, and the defendant, Mr. Champlin, recovers nothing on his account in offset; but not knowing how you feel about it, I want to talk about the other

branches of the case for a moment. It has been suggested by counsel for the plaintiff that there were three things to be considered: whether or not there was a contract; whether there was a breach, and if both of those things were so, what damages were incurred.

Well, as to a breach, it is true there is this correspondence here throughout, in which, after a while, the parties commenced to jockey with one another. After the middle of the summer, when they commenced to smell a lawsuit, you can't put much dependence on these letters and telegrams, because without doubt each party was trying to get the other party in a position where he would have them at an advantage; and when lawyers get into a thing like that, gentlemen, look out for these letters.

But up to the that time you are safe in taking those letters and telegrams and considering them to see whether there was a breach in the contract. At any rate, Mr. Champlin hasn't got a treater. Now if he hasn't got a treater and it wasn't his fault and if he made a contract for one, then the next thing to determine is—if you get to that point—what damages he is entitled to. And that is a very difficult and complicated phase of the case. It is made more difficult and more complicated by the fact that Mr. Champlin here claims—having proved his contract and breach as he says—he claims he is entitled to a large sum of money for the loss of profits in the operation of his cracking plant—his treater—the cracking plant with the treater. And it is my duty to instruct you as to the law governing damages, in case you have to use it, and especially with reference to those lost profits.

[fol. 785] Now the law provides that if one person suffer loss through the breach of a contract which he has with another person, just compensation for the loss sustained may be recovered in a civil suit, such as this. Such compensation is called damages.

If there is a breach of a contract with no particular damage or with no damage that can be proved or recovered under the rules of law, nevertheless he may recover what is called nominal damages. So, if a contract is proved and a breach of it shown, the complaining party is entitled to recover one dollar, anyway.

The rules governing the recovery of compensation for real and appreciable loss, due to a breach of contract, which compensation we will refer to as damages, are in general these:

They must be for the natural and direct consequences of the breach, according to the usual order of things, such as would be expected to happen and without any other intervening cause; and they must be such as may be reasonably supposed to have been within the contemplation of the parties at the time of making the contract as a probable result of a breach thereof.

That is general language and might mean one thing to me and another thing to you. It happens that some years ago Mr. Justice Holmes of the United States Supreme Court had occasion to elucidate that expression of being "within the contemplation of the parties," and he said the rule could be considered from the point of view whether or not it might be presumed that the party claimed to be liable would have assented to such a scope of his liability if it had been presented to his mind beforehand; that is, to say, what liability as to damages might the party be fairly supposed to have assumed consciously, or to have warranted the plaintiff reasonably to suppose he had assumed when the contract was made?

Another general rule to be borne in mind, and which has special application to this case, is that damages to be recoverable must be susceptible of definite ascertainment and must not be uncertain, speculative, contingent or conjectural.

[fol. 7[illegible]] And also, if all the elements which justify a recovery are present, the party injured by breach of a contract cannot recover for any loss which he might reasonably have avoided. If he is confronted with a breach of contract he must use every reasonable effort to mitigate the damage and take all measures that business prudence would dictate to make his loss as small as possible.

It is probable that counsel will not question the correctness of the above principles. It is the application of them that breeds a controversy, and particularly in the matter of profits that you have heard about for so many days. It is claimed by the Champlin Company that it can recover the business profits it apparently lost while waiting for a

treating plant as a part of its damages. This is denied by the Gasoline Products Company. I believe there is a certain merit in both positions.

The general rule is that anticipated profits prevented by the breach of a contract are not recoverable by way of damages for such breach; but that is the case where the application of the general rules above mentioned prevent; because in most cases expected profits are uncertain, contingent and conjectural. They depend upon changing, indefinite and uncertain contingencies, or they are not the natural and direct result of the breach and cannot be said to have been in the contemplation of the parties when the contract was entered into.

The law does not prevent the recovery of profits because they are profits, but because of their uncertainty or remoteness. It is only such profits as are speculative, remote, uncertain or not in contemplation of the parties that cannot be recovered.

"It is equally well settled that the profits which would have been realized had the contract been performed, and which have been prevented by its breach, are included in the damages to be recoverable in every case where such are not open to the objection of uncertainty or of remoteness, or where, from the express or implied terms of the contract itself, or the special circumstances under which it was made, it may be reasonably presumed that they were within the intent and mutual understanding of both parties at the time it was entered into."

[fol. 787] I feel sure that there will be no disagreement with this last proposition, because I have quoted the language from a case decided by the U. S. Supreme Court that both sides have cited to me.

Damages are not to be measured by uncertain profits that might have been made, but by the loss of the value of the ownership or use. To ascertain the value of the use of a machine it may be necessary to consider profits as one element, but only such profits as can come within the rules above mentioned.

As a basis for estimating damages you must estimate the value of the use of the Cross treater as an adjunct to the cracking plant in the defendant's business during the time he was deprived of it. In arriving at the value of this use

you can take into consideration the profits the defendant could have made out of his refinery if it had run, so far as you can definitely and certainly figure such profits without conjecture or guess, and without violating any of the other rules surrounding the recovery of damages which I have outlined.

Now, that will put up to you a pretty difficult problem to figure out, unless we tried to apply to some extent those rules.

Of course I am assuming now you are getting to the question of damages, and you are now to try to determine what, if anything—what was lost by depriving Mr. Champlin of the use of this treater, if he was wrongfully deprived of that use.

Now what was the use of the treater? What was the value of the treater? We have testimony here to the effect that that being a laboratory experiment, never having any commercial use, nobody exactly knew what the treater would do. Dr. Cross says—as I understood him—he said, first, that it was impracticable on account of the expense of the copper. That the copper could not be recovered and was wasted in one or more operations, and cost so much that in this business it could not be used profitably and therefore was not a practicable adjunct to the business. I understood him, again, when he testified later on inquiry relating to the same matter, however, that he had some hope still—being the father of this idea—that it would prove better than they first thought.

[fol. 788] So there we have, if I am correct in my recollection, the testimony relating to that. Apparently nobody knows whether it is a practicable, paying proposition, or not, to have one. Dr. Cross hopes that it will be. I believe Mr. Gray, as sometimes criticized by counsel for the defense here, says that in his opinion it was too expensive an operation to be practicable in commercial use. You will have to decide about that the best way you can—what they are good for and what Mr. Champlin's loss by not having it was.

Well, now, if it was no good, and he didn't have it, he couldn't have suffered any loss by not having the use of it. If it was no good at all, he couldn't have suffered any loss by not having the use of it.

But of course he would be entitled to at least nominal damages for breach of that contract, if it was made and broken, even if we cannot say that he got any benefit from the use of the treater.

Well, now, it might be of some use even then, if it wasn't a practicable thing. I don't know how you look upon that. You may find it did have some value. You are entitled to your opinion about it. You must make up your minds from the evidence. You are entitled to that. And if it had any at all, let's consider what its use would be as an element in making up these alleged profits which Mr. Champlin says he lost. And you will have with you this tabulation called Defendant's Exhibit 61 which tabulation shows the profits that Mr. Champlin's bookkeeper and expert says he would have made if they had erected the plant during that period.

Now, as I understand it, that contemplates the running of a plant at full capacity and getting the utmost possible result out of the operation of it at that time. It assumes everything favorable. It assumes favorable selling of the products and it assumes all the circumstances which go into a favorable operation of a plant of that nature. It doesn't take into consideration the depreciation and overhead expense nor bookkeeping, salaries, and that sort of thing during that period. But I think, on the theory of the [fol. 789] defendant, who puts this forward as an illustration of his claim, that he would not be required to deduct those overhead expenses for this particular purpose.

He claims that he is deprived of money that he otherwise would have earned and has added that to his general treasury and that the expenses of his overhead would have gone on just the same. So I think you need not take into consideration any deductions of overhead. On the other hand he has furnished the tabulation which you have here as an exhibit, as to interest. You should omit that, I think, from your calculations, because I don't think that these unliquidated damages, as we may call them—I don't think that on these undetermined or unliquidated damages, that interest can be figured at all.

Now, as to this matter of profits. That is by far the largest item claimed. In considering that matter of profits you must do so under these rules I have carefully laid down to you which govern profits as damages. That is, it is Mr. Champlin's duty to prove to you and to satisfy you that all

the elements making up these alleged profits are present here, including the element of the cracking plant; and I confess I am somewhat at a loss to know where to place this cracking plant—I should have said treating plant—change that—in both instances—the treating plant. Of course we know all about the cracking plant. That would work at any time efficiently and is doubtless a good plant. But, as I understand it, in order to get these results, a treating plant was supposed to be in operation. Like this—now—that is to say, he complains that he didn't have this treating tower during that period. Now, if he had it, how could we figure what it was worth as an element—as a profit-making element? I must confess I fail to see where it would fit into the picture and comply with those rules I have laid down; but I may be mistaken in my view of it. You are practicable men, and I want you to consider whether or not you can make up, under these rules I have laid down to you, any figures that will satisfy your minds that will compensate Mr. Champlin for his alleged loss under his contract as claimed under these circumstances. Now, another thing [fol. 790] which you should consider is this: These figures represent, as I understand it, the total profitable results of the operation of this plant. They don't take into consideration anything that he should or would naturally have produced with that plant without this cracking system. This plant of course was there without the treater system.

This plant, of course, was there. The cracking plant was there. It has some value. It can be used for certain other angles, without this particular kind of a treater, and it was Mr. Champlin's duty to minimize these damages as much as possible, if there are any.

It is his duty to show to you what that plant did earn and pay, and as a matter of fact, what was the result? Was it operated at a loss? I don't think it was shut down entirely, and whatever that was of course would be deducted from whatever this gross amount here is that it is claimed. So it is up to you to discover whether you can by applying any of these rules figure out any problem as a part of these damages. If you figure out any at all, it must be with the distinct thought that that must be entirely covered by these rules and nothing else in the course of the figuring.

Now then I will leave that there so far as the matter of profits is concerned. If there should be anything based

upon profit here, that is that. If there should not be, you should not find the elements present which will authorize you to use profit as a part of the damages, let us see in what other direction they are entitled to any damages, if they have a contract, and if it is broken.

Well, if this treater wasn't any use, they did not have the use of it on their theory that there was a contract and they had to do something else, what did they do? They went and bought another plant, bought another kind of a machine, used for the same purpose, and they paid $26,714. They put in a chlorine plant which cost $6,800. That made $33,500. They figure that during the time of the life of that particular treating system or what was used in lieu of a treating system, the chlorine treatment, there will be depreciation of the whole thing in some series of time, and that [fol. 791] is figured to be $20,176. They add these two together and they take from it the estimated cost of this treater that they claim they were entitled to, and that would leave, not minding interest, which I shall eliminate, about $32,000 on the basis that they were entitled to this treater and didn't get it, and had to buy something, the best they could at the time, to take its place.

On the basis that they were entitled to this treater and didn't get it and had to buy another one. Now in all these matters of course they must show the utmost earnestness in mirimizing their loss. If they can buy a treater cheaper than that, if they can do anything else to avoid it, they must make the loss, of course, as you understand it, as small as possible.

Now there is another view. There is the profit view which I have tried to explain to you, to be governed by all those features I have listed or tried to, and this other feature: all these being based upon the supposition there was a contract, whereby, if they had to go and buy another one to take its place, which cost them net, excluding interest, $32,000. Then there is another feature that they advance, and that is to the effect that there was a certain depreciation of this plant on account of their deprivation of this use, which they figure from March 24th to October 8th, 1927. They figure it $56,000, and that is figured on the basis that they paid an income tax unit that the government allowed, there was a depreciation of 25%. Now then of course they ask interest which I have disallowed, and they ask the total

cost of the treating towers which they put up which they say they lose entirely, but I can hardly see how they can charge the whole cost of the treating towers under those circumstances.

So we are brought back to whatever they are entitled to on that theory of the case, if you can properly use the profits, supposed profits, as a basis, in case you are satisfied that they have been deprived of the use of the treater, that it was not entirely useless. They say they are entitled to fifty-five or fifty-six thousand dollars.

Well, now of course if they were entitled to any depreciation or any damages based upon depreciation, that must be [fol. 792] because there was no other element entering into the matter, but the plant of course would be used, I take it, for something. There is no reason why the plaintiff here, the Gasoline Company, should be charged with the total depreciation without some offset. You must discover and decide what, if anything, Mr. Champlin could have done to have made use of this plant and caused it to pay something to help out on any loss he would sustain. The evidence is there before you. I do not recollect now the details of it, but I must assume that you do, and you must use your judgment in considering not only that but any details of the four or five plans which Dr. Cross said could have been used in this very way to minimize the damages.

Whether the damage is on profits or any other way he said they could have used this plant to advantage in these five different ways which you may remember. One was the mixing of two kinds of gasoline, and so on down the line.

It is necessary for you to consider those problems of not only the gross loss but the net loss. What should have been the net loss, if the Champlin people had taken all the measures they could have taken to make that loss as small as possible? I realize it is complicated and very difficult for you to enter into, gentlemen.

There is one matter that occurred to me as I was going over this that I overlooked, and that is this: It seems to me that the parties, at least the defendant, the Champlin Company, in their view of the case, in their theory and evidence, rather assumed that there was a warranty that this treater would do something, would accomplish certain results, but as I understand it, there is no warranty that this treater would do anything except there is a statement of what

would be a warranty in this letter of February 5th, to the effect, I believe, that if it was—well, I will leave that to you. There was not to be any payment for this treater in case it was not satisfactory, and the word "satisfactory" was defined. You take a contract, make any kind of a claim either for an option or purchase, and put any warranty in writ-
[fol. 793] ing, that is supposed to be the whole warranty between the parties. No other warranty can be proved. I take it that is the only warranty here. So I take it there is no warranty on the part of the Gasoline Company that this machine would be useful for anything. That it would do—I will take that out—no warranty it would do any particular thing or accomplish any particular result. I think the testimony has been rather vague upon the fact that it would do what people hoped it would do.

(Counsel confer with the Court.)

The Court: Gentlemen, you will have to bear with us a few minutes longer because the parties, out of natural caution and a desire to protect the rights of their clients, have asked me for certain instructions which cover their view and their theory of the law in this case.

My attention is called to the fact that when I adverted to the matter of the conference in New York where representatives of Mr. Champlin were as you recall and Mr. Gray, I think, his deposition—wasn't that the time?

Mr. Jones: They were not taking the deposition in May, Your Honor. The conference was in May 1926.

The Court: In New York?

Mr. Jones: In New York with Mr. Harcourt and the rest of them there.

The Court: As I say, relating to that matter of the conference in New York I may have said, as it is thought by the Counsel for the defendant I did say, that if it is true that while there Mr. Champlin's representatives were asked about the treater and said he had not made up his mind yet what he would do, that could not be true and a contract exist. That is, I think, a rather strong assertion on my part. I take that back to this extent: If that testimony about the conference in New York is true and if there the statement was made by the representatives of Mr. Champlin that they didn't know yet what they would do about a

treater, I will say it would militate strongly against the position of Mr. Champlin, but is not necessarily conclusive. [fol. 794] Now it is also suggested that Mr. Champlin, if he had a contract, was entitled to have this treater system without regard to whether or not this copper part was feasible, because he could have used the remaining parts of it, eliminating the copper, and have used the towers, or whatever they are, and put in some other part to take the place of the copper and had the benefit of the salvage, so to speak, of these towers. That is true; he was entitled to the benefit, the benefit of the use, if he had a contract, the benefit of the use of those towers, and he could have eliminated, as I say, and as they suggest, the copper feature.

Now they also ask me to charge you, which I do,—and, of course, this does not come along logically because they have gone back to the beginning of it—that if you find that on February 6th the defendant accepted plaintiff's entire proposition, including the vapor phase treater, royalty-free, conditional only on its financing, that the condition was removed on February 25th by the money being passed to his credit. I instruct you that at that time the condition was removed and the whole offer stood accepted; that is to say, I instruct you that that is their theory. I do not instruct you that the offer was accepted, but I believe their theory is that it was accepted as to the vapor phase system and whole thing on February 7th, conditional upon the Champlin Company being financed, and it is true that that condition was removed, so that, if they accepted the offer on that condition, that condition did not affect the matter because it was removed.

Also you are instructed to give no consideration to Clause 15 of the so-called License Agreement, as argued by Mr. Hale, because I instruct you that the clause is limited to the License Agreement alone. It has no bearing upon the question whether there was or was not a contract between plaintiff and defendant with reference to the treating towers. That is true. This clause that they speak, of I believe Number 15 in the License Contract, I believe was limited in its scope to the cracking plant and agreements relating to that contract have nothing to do naturally with the treater contract, or treating towers.

[fol. 795] Here are some more instructions, Gentlemen, which I am asked to give by the defendant, and which I

give to you, although I think I have in some instances covered a large part of the subject matter. These are the instructions:

"1. If you find that the plaintiff made an offer to the defendant, to give defendant a Cross vapor phase treating tower royalty free, in consideration that defendant would purchase of the plaintiff two Cross cracking units, and that it was understood between the parties that a treating tower meant such towers as would be sufficient to take care of the capacity of said two Cross cracking units, and that said offer was duly accepted by the defendant, then I instruct you that a contract was entered into binding on the plaintiff to erect for the defendant a Cross vapor phase treating system sufficient to take care of the capacity of the Cross cracking plant, and plaintiff is liable for all the natural and consequential damages suffered by the defendant by reason of plaintiff's failure to erect said treating towers in the time contemplated by the parties."

That is true, but, of course, subject to all these rules I have given you in relation to damages.

"2. If you find that there was an oral offer made by persons whom you find to be agents of the plaintiff and made in behalf of the plaintiff, and that such offer was accepted by the defendant, then the fact that the plaintiff, through any representative, had a change of mind on account of any question as to the efficiency or economy of the treating towers or as to the legal right to use them would be immaterial."

I give you that. I have already spoken of this matter of change.

"3. If you find that an offer was made in behalf of the plaintiff to the defendant, by parties representing the plaintiff or who, from all the evidence, you find the defendant was entitled to believe did represent the plaintiff, and such offer was accepted by the defendant, you will find that the minds of the parties met and that a contract was made."

That, I think, is fair enough to give.

[fol. 796] "4. In determining whether or not there was an offer by agents of the plaintiff made on behalf of the plain-

tiff and an acceptance by the defendant, it is proper for you to consider the subsequent actions of the parties with respect to the subject matter of any such offer and acceptance, including the written communications between the parties."

I have already in substance advised you to that very effect.

"5. In considering the omission of the plaintiff to cause to be erected the treating towers, you are entitled to consider what motives directed it in such course, and in considering such motives you are entitled to give due weight to the evidence with respect to the question of efficiency and economy of operation of the Cross treating towers and the question of the legal right to install and use the same, and also such facts as you will respect to the subsequently shown relationships between the Kellogg Company and the Gray Processes Company."

"6. If you find that the parties entered into a contract for a vapor phase treating system to go with defendant's cracking plant, and that the plaintiff failed to perform the conditions in said contract by it to be performed by failing to erect the vapor phase treating towers, then the defendant is entitled to recover such damages as are the natural and probable consequence of plaintiff's breach of contract."

Subject, of course, to the rules I have already given you, which modify all of these instructions.

"7. If you find for the defendant, in accordance with the instructions previously given you, I instruct you that defendant is entitled to recover all the damages which are the natural and probable consequence of plaintiff's breach of contract, and all damages which the parties should reasonably anticipate would result from a breach of contract by the plaintiff, and in this respect I instruct you that the defendant would be entitled to recover all the profits which it lost by reason of plaintiff's breach of contract, if you find that profits were in the contemplation of the parties [fol. 797] when the contract was entered into and that the profits claimed are not remote nor speculative but are capable of reliable measurement, that is, can be ascertained by you with a reasonable degree of certainty."

That is in substance what I have already told you, and, further, I will instruct you that they must be in no degree conjectural. That word was omitted from the instruction.

"8. If you find for the defendant in accordance with the instructions previously given, I instruct you that the defendant is entitled to recover from the plaintiff the profits that it would have realized if the plaintiff had erected for the defendant a Cross vapor phase treating system to operate in conjunction with defendant's cracking plant from the time when the cracking plant was finished and ready for operation to the time that defendant had erected and put in use its own treating towers, provided, you find that said profits were in the reasonable contemplation of the parties at the time of entering into said contract, that they are not remote nor speculative and can be ascertained by you by calculation with a reasonable degree of certainty."

That is very much the same as the last one, and, is also modified by what I have told you about certainty and the lack of conjecture.

"9. If you find for the defendant in accordance with instructions previously given you, I then instruct you that defendant is entitled to recover for the loss of all profits by it sustained by reason of plaintiff's breach, if you find that profits were in the reasonable contemplation of the parties at the time the contract was entered into, that they are not remote nor speculative and can be by you ascertained by calculation with a reasonable degree of certainty."

The same is true of that as of the others. That is a partial statement of the law and must be controlled and modified by what I have told you in relation to the rules governing damages.

"10. If you find for the defendant in accordance with instructions previously given you, and find that the defend- [fol. 798] ant is entitled to recover for loss of profits sustained by it in accordance with instructions previously given you as to when profits may be recovered, I then instruct you that the defendant is entitled to recover the profits which it would have made if plaintiff had given defendant what it agreed to from the time the treating towers should have been erected by the plaintiff up to the time the

defendant should have erected its own treating system to replace that which plaintiff failed to erect, together with interest on those profits from the date plaintiff was first apprised of defendant's claim to the present time, plus the extra expense incurred by the defendant in erecting treating towers of its own, together with interest on the cost of said towers from the date when plaintiff was first apprised of defendant's claim."

I do not give you instructions in regard to interest; I think they are not entitled to any interest, and I do give you the other instructions subject to the rules already given you.

We are getting toward the end of these instructions, Gentlemen. In fact, those other three I shall decline to give, because I think they are either covered or inconsistent with what I have already said.

Now, the plaintiff also has some requests he wants me to give you. There must be some of these that I have already given you.

(Court and counsel confer at bench.)

(Reporter called to bench.)

The Court: Of these requested instructions for the plaintiff I refuse No. 9.

Mr. Hale: May I have an exception?
The Court: Certainly.

The Court: Two and three I shall give, and the others I understand are covered down to No. 10. Except so far as covered, I refuse No. 12. No. 15 is refused except so far as already given.

(Exception by Mr. Hale.)

[fol. 799] The Court: No. 20 and 21 refused except so far as already given.

(Exception by Mr. Hale.)

Mr. Hale: Plaintiff excepts to that part of the charge in which the Court said in substance that it would be hopeless for the jury to carry a distinction between the offices held by different gentlemen referred to in the testimony.

We except to that part of the Court's charge in which the Court said in substance that the overhead expenses of the Champlin Refining Company need not be considered as a deduction from anticipated profits.

We except to that part of the Court's charge in which it was stated in substance that the Champlin Refining Company had a right to the salvage value of the tower without the copper feature.

Mr. Jones: On the question of damages we can file our exceptions afterwards? Whatever we have called attention to?

The Court: Everything that you have called attention to. Yes.

Mr. Linnell: Note an exception in the record to the fact that we called to the Court's attention a statement of the Court that the cracking plant could have been used for some other purpose and should have been used for some other purpose during that period. Note also exception with reference to interest not being allowed on the investment during the time the cracking plant was shut down. Also, to the instructions that defendant could not charge depreciation without some deduction for what defendant could use the plant for.

And we also except to that part where the Court said that we had tried our case before on the theory that this thing would operate.

Mr. Jones: Note an exception to the Court's refusal to give No. 11, 12 and 13 of the defendant's requested instructions.

The Court: Well, gentlemen, I have eliminated a good many of these details which possibly might have bothered you, and I will give you these three instructions which the [fol. 800] plaintiff asks me to supplement what I have already said. "There was no contract entered into between Gasoline Products Company, Inc., and Champlin Refining Company for the installation of a Cross vapor phase system treating tower or towers unless an offer for such installation was made by the Gasoline Products Company and accepted by the Champlin Refining Company." It contemplates the making and accepting both by the parties, one of whom owned and the other who wanted to buy.

Also: "No offer for such installation can be binding upon the plaintiff unless made by its duly authorized agent." Of course you understand that. While a man may make a contract himself, a corporation has to act through its agent.

Also this: "Defendant is not entitled to recover damages for loss resulting from the fall in market price of gasoline in 1927."

Of course the plaintiff is not chargeable for damages caused by the slump of the market in respect to gasoline. Only in case of these other elements I have spoken of, being present.

And the plaintiff suggests that you may possibly have obtained the idea that where I said it is of no particular consequence here whether the number of towers was one, two or three, which was the subject of the agreement; plaintiff very properly says that it should be considered by you, in determining the question as to whether the minds of parties met, whether one meant one tower, another two, and another one three. Of course the parties must have in their minds the same thing; a contract must be made by a meeting of the minds. If one party thought he was making a contract for two towers and another thought he was making a contract for one, the minds of the parties cannot meet, as a result.

I believe I said the contracts were signed the sixth of February. The fact is they weren't signed until February 26th, and were not delivered until March 20th.

Now I think, with that supplement to what I have already said and the instructions I have given you already, the matter is in your hands, and you must do the best you can [fol. 801] on careful deliberation to work out the proper result. And you may now retire and take all these exhibits with you and bring in a verdict which will be in this manner:

There are two verdicts here, Mr. Foreman. In each case you will find that there is $61,530.56 due the plaintiff. That is agreed. Now, in one of these it contemplates that the amount due on the other side from the plaintiff to Mr. Champlin, or his company, shall be less than this $61,000, in which case you will use one of these verdicts. And in the other case the amount contemplated will be more than

$61,000, and in that case you will use the verdict entitled "For the Plaintiff." The other one being the verdict "For the Defendant."

Mr. McKeever: May I suggest that that be reversed with reference to the names defendant and plaintiff?

The Court: The way they are marked is just the reverse of what I have said. You will see by the figures which I meant.

(Jury withdrew.)

The Court: Mr. Foreman, I understand that you want some further instructions on some point.

The Foreman: We would like to have repeated the portion of the charge relating to damages.

The Court: Well, I don't believe you want all of that repeated, because it is very long. Is there any particular part of it that you think would be more applicable than another part? That is to say, you want information concerning profits, or depreciation, or value of the tower, to use for other purposes, or without the copper feature, or do you want the figures of the price of this treater compared with the one they had to put in? Something of that nature? What is your particular difficulty?

The Foreman: Well, my idea is to give us an outline of the charge relating to damages, covering the whole thing. It would be about all that could be done. We have not come down to any particular portion of it.

[fol. 802] The Court: You haven't got down to figuring out the damages much of any?

The Foreman: No, sir. We have not.

(Transcript produced.)

The Court: Perhaps I can in a way summarize that. Unless counsel want to make some arrangement about their taking this (referring to transcript)? Do you care to express any opinion on that?

Mr. Linnell: What was that?

The Court: I was wondering whether counsel would care to express any opinion on the idea that the jury could take this, the charge is all written out.

(Counsel confer with the Court at the bench.)

The Court: My object is to save time some way or other if we can, gentlemen, both for your sakes and for everybody's. Well, in a way of a summary, I gave the general rules of law that apply to all damages which are in effect that if a person suffers any loss from a breach of a contract the damages should be in the nature of just compensation for the loss sustained. I mentioned that if there is a breach of contract with no damages provable, of course there should be nominal, that is one dollar. But assuming that there is a breach in any given case with real loss, the principal rules are that the damages must be the natural and the direct consequences of the breach, such as would be expected to happen without any intervening cause, and they must be such as were within the contemplation of the parties at the time of the making of the contract, as a probable result of the breach. That is, they must be reasonably understood by the parties, when they made the contract, that if it was broken damages such as claimed would result, and could be claimed, and if that is not true, the parties would not have thought of such a thing as damages, such as were claimed. Damages are not perhaps within the contemplation of the parties. It must be the natural probable result, direct result, of a breach of that particular contract. Now there is one important feature of the rule that applies all along the line in all cases. That is, that to have any [fol. 803] damages they must be such as are not in any degree uncertain, speculative, contingent or conjectural. If you make a contract with me to sell me an automobile for a certain low price, less than I could get it for anywhere else, Mr. Foreman, and then you refuse to carry it out, breach your contract, what are my damages? My damages consist of the difference between what I was going to get that automobile for and what I would have to pay for it in the market, because if I got it from you for less than the market price I at once lost the difference between what I was going to get it for from you and what I would have to pay for it in the open market. Now that is the direct result. That is the result without any intervening cause. It is the natural result. There is no conjecture about it. You know that that rule is going to apply, and it was in the minds of the parties. They might not have consciously thought of it, but if they thought of it they would have known instantly that was to be expected as a result of the breach of the

contract, so that in that case it was in the minds and complies with the rule all along the line. That is what I mean by that. Especially this contingent and conjectural idea. Now, in a case like that, I could not charge you if you broke your contract to sell me that machine for a price of two-thirds of its real value, and not having it, you having broken the contract, in a case like that I cannot charge you what I would have made as a commercial traveler if I had had that to go around the country with, because that would be conjectural, and conjectural and contingent upon many other things, and not at all within the minds of the parties when you and I made the contract. We did not dream of such a thing as that; and there is another way of getting at it, and another measure of damages to be used although of course there are other cases where it would be very much within the minds of the parties that profits that were lost through failure to keep a contract would be the naural result of the thing and within the minds of the parties. I have no doubt there are such cases in the books, of course, but if those profits are ever used as a measure of damages it is not because they are proper as such; it is because they [fol. 804] come within this very rule, and they are natural, direct, expected causes of the breach, and can be arrived at without any conjecture or guess work of any kind.

Now there are features of damage here claimed by the parties which should not be lost sight of, and I am assuming that you are considering the matter of damages of course, and one perhaps is the one brought up by the parties, by the defendant, toward the last of the trial, towards the last of my charge, which the counsel representing Mr. Champlin thought I didn't make emphatic enough, and that was if they had a contract for this treater, and if the contract was broken, they had a right to the treater in order to make such use of it as they could then if they had to use it without this patent appliance of the copperized clay. They say that they could use the towers and the structural part of the thing outside of the copperized clay, use some other feature instead, or something that would do the same thing, and get the benefit of that part of the structure that was proper to use and not expensive to use, not fraught with the objection that might have been urged against the Cross tower as such. That feature, I think, should be borne in your mind. You probably have the figures. You remember

that the estimated cost of the Cross towers was about $21,000, and the cost of the substituted machine there was $26,000. I don't know what the relative cost or value of different parts of each machine would be, but those are figures that you could use in that part of the matter as best you might. If you want to figure on that basis, from that value of that part of the machinery that they were entitled to and didn't get. Then, you remember I talked about the fact that not having received this machine which they were entitled to, as they claim, under the contract, they were obliged to get another machine, and had to pay more for it than they did for this machine; they had to pay twenty-six thousand dollars. Where are those figures, the twenty-six thousand and the twelve thousand? I want that schedule giving the cost of the two sets of towers and the cost of the chlorine plant and the cost of the chlorine treatment spread over the life of it. Have you got that there?

[fol. 805] Mr. Jones: No; there are some on your desk in your room, aren't there?

(The Court thereupon left the bench and subsequently returned.)

The Court: I do not find that particular one, but I can remember what the figures were very closely. On that branch of the case the difference between the cost of the Cross treater, estimated at about $21,000, and what they had to pay for another treater, which was $26,000, plus $6,800 for a chlorine plant, plus $20,000 or $21,000 for the chlorine treatment spread over the life of the plant—the difference was $32,000, very nearly, within $100 of $32,000, on that theory of the case. That is, figuring the plant, the Cross plant, at about $26,000, that is the figure that you want to take out of the following figures: $26,000 plus $6,800, plus about $20,000.

I am not giving you these figures in the way of instructions. I am simply saying that these are what the parties claim on this particular theory. That must be about right. As I remember, the figure that I gave you on that theory of that particular branch of the damages, if you wanted to use that, was just as I say, the figure of $26,000 which was the cost of their plant, plus $6,800 which was the chlorine treatment, plus $20,000 which was the process covered over

a period of years, making about $52,800, less $21,000, the cost of this Cross plant, leaving about $31,800, or $32,000, I figure it roughly. That would be on that feature of the case.

Then there is a claim here based on depreciation of the cracking plant. Now these are alternative ways of getting at the damage, you see. These are possible ways of looking at it. I don't know which one you will adopt. What you are trying to arrive at is to restore these people, the Champlin people, to the same financial position they would have been in if they had had this Cross plant that they were to have, so far as you can without violating these rules I have given you of guesswork, conjecture, and so on.

The evidence, I regret to say, seems to me in many cases is very difficult to use as a basis for such damages without a [fol. 806] certain amount of conjecture, etc., but that is not your fault nor mine. The burden of proof is on the Champlin Company to show you what the damages are. If they cannot show you, it is not your fault. So far as they can show you and you can apply these rules that I speak of satisfactorily and get a satisfactory result, then they are entitled to the result, to those damages, provided you get to that point, as I assume you have.

Now I was led to that slight digression when I began to speak on the matter of depreciation, because in that matter of depreciation, which they claim at $55,900, plus some interest, which I do not think they are entitled to in a case like this, that should be considered in connection with the duty on the part of Mr. Champlin and his company to minimize any of those figures by such use of the plant as it was reasonably possible to make, anticipating this result. That is, as soon as he became satisfied that he wasn't going to get this Cross treater, it was his duty to so shape his affairs that he would make those losses just as small as possible, if there were going to be a loss. That is, he can't sit down and do nothing and then charge the whole result of his plant, cracking plant and all, up to these people until he got ready to start his plant, to start his own machine again, unless that was absolutely necessary as a part of the damages that would be expected by the parties within their minds and inevitable, so to speak, and in such situation that he couldn't offset them with any result to be

achieved by the operation of that plant, either by selling the stuff directly, without treating it again, or by getting some other method in of treating it. In some way it was his duty of course, if possible, to do it, to make his damages and his loss as small as possible.

The evidence on what he could have done is indefinite. It is not very easy to get at. You have to conjecture somewhat on that. If you are going to do anything about that part of it, you have got to use some judgment of that nature, it seems to me, to discover what you think he could have done, because even in these five methods that have been mentioned as a possible offset, there has been no very [fol. 807] definite figures given, and I admit that it is difficult for you to put figures in where none have been given to you, and there is very little basis for figures. But you are of course in all respects to be governed by these rules, that you can't guess on either side, either on the credit side or the debit side of these figures. You can't put any figures down here unless you are certain that they are warranted by the others, and that they come within all these rules which I have given you as to certainty and lack of remoteness and in the minds of the parties and not the result of any conjecture on your part.

Do you gentlemen think of anything else you would like to have said to them?

(A conference was then held between Court and Counsel.)

Mr. Linnell: Exception with reference to the Court's instruction as to damages involved in the construction of the tower which the defendant constructed to take the place of the one that had not been put up by the plaintiff.

The Court: There are, of course, gentlemen, three general fields in which you can go to look for damages. I have already mentioned two of them, and the third of course, which I touched upon considerably at length both previously in my charge and now, is this difficult matter of the profits which you have already noted on paper. Those are the figures to which you must apply the rules I have already given you in regard to certainty, definiteness, being in the minds of the parties and lack of conjecture. That is what I especially figured that that rule should be applied to—

figures like that. It is up to you to say whether that or any part of it is properly allowable as damages under those rules.

That is about all I can tell you about it. Those rules apply to that and all these other methods of granting damages. Of course I don't think you should give all of them or any two of them. As far as I can see, you should select one. There is no doubt about that, is there gentlemen? You don't claim there is more than one theory of damages? You should select one and stick to it. These are alternate [fol. 808] suggestions in which you might find your damages according as you take one view or the other of the matter. For the present I think that is all I can do for you.

It has been suggested to me that I used the words, "You must conjecture," in relation to damages. What I mean is you must not conjecture; you must find only figures that you do not have to conjecture on either side.

Mr. Hale: At the close of the charge the plaintiff renewed its exception to that part of the charge relative to the alleged salvage value, so-called, of the towers.

Mr. Jones: Your Honor understood that Mr. Linnell took an exception to that part of the charge refusing the cost of the treating tower?

The Court: That is the $26,000 that you charge if the Cross treater wouldn't work at all?

Mr. Jones: We asked instructions of the cost then to us of the present treating towers, which were refused, to which we took exception.

The Court: Yes.

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In United States District Court, District of Maine

No. 1134

Gasoline Products Company, Inc.,

vs.

Champlin Refining Company

Verdict—Received and Affirmed May 2, 1929

For Plaintiff

The jury find that the amount due the Plaintiff on its writ is Sixty-one Thousand Five Hundred Thirty Dollars and Fifty-six Cents ($61,530.56);

[fol. 809] And that the amount due the Defendant on its account in set off is Forty Thousand Nine Hundred Eighty Dollars and Fifty-nine Cents ($40,980.59);

Leaving a balance due the Plaintiff in the sum of Twenty Thousand Five Hundred Forty-nine Dollars and Ninety-seven Cents ($20,549.97).

Raymond F. Bennett, Foreman.

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IN UNITED STATES DISTRICT COURT

STIPULATION EXTENDING TIME FOR FILING EXCEPTIONS—Filed May 18, 1929

In the above entitled cause it is hereby stipulated between the parties hereto that the time for filing bills of exceptions, whether on the part of the plaintiff or on the part of the defendant, be extended to and including June 15, 1929.

JAP

Taylor, Blanc, Capron & Marsh, Merrill, Hale, Booth & Ives, Attorneys for Plaintiff. Bradley, Linnell & Jones, Attorneys for Defendant.

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IN UNITED STATES DISTRICT COURT

PLAINTIFF'S BILL OF EXCEPTIONS, AND ALLOWANCE—Filed May 31, 1929

This was an action in a plea of covenant broken brought by the plaintiff for the recovery of royalties under a written agreement termed a "license agreement" to which the defendant pleaded the general issue with a brief statement of special matter of defense, and filed an account in set-off claiming damages for breach of an alleged contract on the part of the plaintiff for the installation by the plaintiff royalty free, of a Cross vapor phase system treating tower for use in connection with the defendant's Cross cracking [fol. 810] plant at its refinery in Enid, Oklahoma. The defendant confessed its indebtedness to the plaintiff under said license agreement in the sum of $61,530.51 and the only issue involved at the trial was upon the plaintiff's

liability to defendant on defendant's account in set-off. The case was tried before Peters, J., and a jury April 23 to May 2, 1929. The jury returned a verdict for the plaintiff in the confessed amount of $61,530.51 and returned a verdict for the defendant on its account in set-off against the plaintiff in the sum of $40,980.59. In the course of the trial the plaintiff took and alleged the following exceptions to rulings of the Court.

Exception 1. At the close of all the evidence offered by and in behalf of the defendant upon its account in set-off the plaintiff filed a written motion to the Court to direct a verdict in its behalf in the sum of $61,530.51 and for cause of said motion set forth first that the defendant had confessed its indebtedness to the plaintiff in said amount and second, that the defendant had failed to establish any claim or right of action by the defendant against the plaintiff. This motion the Presiding Justice denied and the plaintiff seasonably excepted to such denial, and its exception was allowed.

Exception 2. In the course of the trial the plaintiff objected to the admission of any testimony regarding the prospective profits from the operation of the Cross vapor phase system treating tower and such evidence was admitted over the plaintiff's objection as more fully appears from the following excerpts from the testimony:

"Mr. McKeever: Now, if the Court please, under our arrangement, the principal purpose of this testimony will be directed toward the proof of the measure of damages——

The Court (interrupting): Yes. That is, from this point on your proof will be directed toward the point of damages based on lost profits; or until further notified.

Mr. McKeever: Yes. And I was about to say that there may be some questions—some general questions—that are [fol. 811] general in their nature, and when the auditor comes with the figures it will then divide itself absolutely.

Mr. Hale: And it is understood that all questions relating to loss of prospective profits are objected to by the plaintiff, and the plaintiff's rights protected.

The Court: Yes. They are admitted against your objection, and you are allowed an exception."

* * * * * * *

"Yes. Now I will have the reporter mark the tabulation sheet and identify it as Defendant's Exhibit 61, that it might be offered in evidence and made a part of the record for the benefit of Court and jury and counsel.

Mr. Marsh: You understand, sir, that all this tabulation and all this testimony is subject to the same objection that we have discussed before?

The Court: Yes.

Mr. McKeever: Yes. I so understand it."

* * * * * * *

By Mr. McKeever:

"Q. Now, Mr. Leverton, have you compiled any figures to determine the cost of the operation of what is commonly called here the chlorine plant?

Mr. Marsh: I understand that this line of questioning is still subject to our continuing objection.

The Court: Is this on the question of damages?

Mr. McKeever: On the question of damages, and I should announce that this now will be a separate element from what it has been heretofore, to keep them separated.

Mr. Marsh: We make the same objection, Your Honor.

The Court: Admitted.

Mr. Marsh: Exception.

(Exception noted for plaintiff)."

The plaintiff seasonably excepted to the admission of all this testimony and its exceptions were duly allowed.

Exception 3. In its charge to the jury the Court used the following language:

[fol. 812] "If you find there was no authority in Mr. Keith from the Development Company, the owner of this patent, to make this arrangement claimed to have been made, why then there would not be any legal contract, but I say frankly that I think it is probable on account of the interrelations of these corporations that these corporations and their officers, on account of the letters, on account of what they had to sell, on account of what they must have known afterwards, I think it is probably that you will not stumble at that step, but will probably find that there was

authority to make an arrangement with Mr. Champlin touching this treater, if there was any arrangement made, and that is all I shall say about the matter of agency."

The plaintiff seasonably excepted to this portion of the Court's charge and its exception was duly allowed by the Court.

Exception 4. In its charge to the jury the Court used the following language:

"Now it seems, Mr. Champlin goes on to say, that on February 5th, Mr. Keith and Mr. Harvison came down. Mr. Harvison as you know is the Vice-President of that Kellogg Company and Mr. Welling was the Vice-President of the Gasoline Products Company. But it is hopeless for either you or me to try to carry the distinction between the offices held by these gentlemen. That is too fine a detail I think, for us to bother much with. I think we shall have to take up the other points in the case."

The plaintiff seasonably excepted to this portion of the Court's charge and its exception was duly allowed by the Court.

Exception 5. In that portion of its charge to the jury relating to the damage recoverable by defendant for breach of the alleged contract, the Court, referring to a tabulation of loss of profits admitted in evidence as Defendant's Exhibit 61, used the following language:

"Now as I understand it that" (referring to Exhibit 61) "contemplates the running of a plant at full capacity and getting the utmost possible result out of the operation of [fol. 813] it at that time. It assumes everything favorable. It assumes favorable selling of the products and it assumes all the circumstances which go into the favorable operation of a plant of that nature. It doesn't take into consideration the depreciation and overhead expense, nor bookkeeping, salaries and that sort of thing during that period. But I think on the theory of the defendant who puts this forward as illustration of his claim, that he would not be required to deduct those overhead expenses for this particular purpose."

The plaintiff seasonably excepted to this portion of the charge and its exception was duly allowed by the Court.

Exception 6. Further in its charge with relation to damages, the Court used the following language:

"Now it is also suggested that Mr. Champlin, if he had a contract, was entitled to have this treater system without regard to whether or not this copper part was feasible, because he could have used the remaining parts of it, eliminating the copper, and have used the towers, or whatever they are, and put in some other part to take the place of the copper and had the benefit of the salvage, so to speak, of these towers. That is true; he was entitled to the benefit, the benefit of the use, if he had a contract, the benefit of the use of these towers, and he could have eliminated, as I say, and as he suggests, the copper feature."

To this portion of the Court's charge the plaintiff seasonably excepted and its exception was duly allowed.

Exception 7. The plaintiff also requested the Court to give the jury the following instruction:

"Upon the pleadings the defendant is not entitled to recover from the plaintiff by reason only of inducements, if any, offered by plaintiff to defendant to secure the license contract sued on, as the same are expressly waived and excluded by clause 15th of said contract."

The Court refused so to instruct the jury, the plaintiff seasonably excepted to such refusal and its exception was duly allowed by the Court.

[fol. 814] Exception 8. The plaintiff also requested the Court to instruct the jury as follows:

"There is no evidence of any damage whatever having been sustained by the defendant from the plaintiff's alleged breach of the alleged contract for the installation of treating towers."

The Court refused so to instruct the jury, the plaintiff seasonably excepted to such refusal and its exception was duly allowed by the Court.

Exception 9. The plaintiff further requested the Court to instruct the jury as follows:

"Upon all the evidence, no special circumstances were communicated to the plaintiff by the defendant at the time

of making the alleged contract for furnishing a treating tower or towers which would permit the recovery of anticipated profits for the breach of such a contract, if made."

The Court refused so to instruct the jury, the plaintiff seasonably excepted to such refusal and its exception was duly allowed by the Court.

Exception 10. The plaintiff further requested the Court to instruct the jury as follows:

"On all the evidence defendant has failed to prove that it sustained any loss as a proximate result of plaintiff's alleged breach of contract."

The Court refused so to instruct the jury, the plaintiff seasonably excepted to such refusal and this exception was duly allowed by the Court.

Exception 11. The plaintiff further requested the Court to instruct the jury as follows:

"Defendant has failed to prove what profits would have been realized had the alleged contract been performed."

The Court refused so to instruct the jury, the plaintiff seasonably excepted to such refusal and its exception was duly allowed by the Court.

Exception 12. After the jury had been deliberating for some hours they returned with a request for further in- [fol. 815] structions on the question of damages and the Court in instructing them further used the following language:

"If they" (i. e. the defendant) "had a contract for this treater, and if the contract was broken, they had a right to the treater in order to make such use of it as they could then if they had to use it without this patent appliance of the copperized clay. They say that they could use the towers and the structural part of the thing outside of the copperized clay, use some other feature instead or something that would do the same thing and get the benefit of that part of the structure that was proper to use and not expensive to use, not fraught with the objection that might have been urged against the Cross feature as such. That feature I think should be borne in your mind."

The plaintiff seasonably excepted to this portion of the Court's supplemental charge and its exception was duly allowed.

The plaintiff now presents this its Bill of Exceptions and prays that the same may be allowed. The declaration and all other pleadings, the evidence, the exhibits, the motion of the plaintiff for a directed verdict in its favor, the rulings of the Court thereon, the requests for instructions to the jury and all the Court's charges to the jury are made a part of these exceptions.

Gasoline Products Company, Inc., by its Attorneys, Taylor, Blanc, Capron, Marsh, Verrill, Hale, Booth & Ives.

Dated Portland, Maine, May 16, 1929.

Seen and agreed to as to form.

McKeever, Elam & Stewart, Harry O. Glasser, Beane & Beane, Bradley, Linnell & Jones, Attorneys for Champlin Refining Company.

[fol. 816] Allowance of Exceptions.

Exceptions allowed this 29th day of May, A. D. 1929.

John A. Peters, Judge United States District Court.

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IN UNITED STATES DISTRICT COURT

DEFENDANT'S BILL OF EXCEPTIONS AND ALLOWANCE—Filed June 15, 1929

This was an action in a plea of covenant broken brought by the plaintiff for the recovery of royalties under a written agreement termed a "license agreement" to which the defendant pleaded the general issue with a brief statement of special matter of defense, and filed an account in set-off claiming damages for plaintiff's failure to install a Cross Vapor Phase Sytem treating tower for use in conjunction with a Cross cracking plant, which M. W. Kellogg Company had constructed for defendant, and the right to operate which, under said "license agreement," defendant had purchased of plaintiff. The defendant confessed its in-

debtedness to the plaintiff under said license agreement in the sum of $61,530.51 and the only issue involved at the trial was upon the plaintiff's liability to defendant on defendant's account in set-off. The case was tried before Peters, J. and a jury April 23 to May 2, 1929. The jury returned a verdict for the plaintiff in the confessed amount of $61,530.51 and returned a verdict for the defendant on its account in set-off against the plaintiff in the sum of $40,980.59. In the course of the trial the defendant took and alleged the following exceptions to rulings of the Court.

Exception No. 1. In its charge to the jury the Court used the following language:

"He claims that he is deprived of money that he otherwise would have earned and has added that to his general treasury and that the expenses of his overhead would have gone on just the same. So I think you need not take into consideration any deductions of overhead. On the other [fol. 817] hand he has furnished the tabulation which you have here as an exhibit, as to interest. You should omit that, I think, from your calculations, because I don't think that these unliquidated damages, as we may call them—I don't think that on these undetermined or unliquidated damages, that interest can be figured at all."

Defendant seasonably excepted to this portion of the Court's charge and its exception was duly allowed by the Court.

Exception No. 2. In that portion of its charge to the jury relating to the damages which defendant could recover for breach of contract, and referring specifically to loss of profits from failure to install the treating plant, the Court used the following language:

"Now, as to this matter of profits. That is by far the largest item claimed. In considering that matter of profits you must do so under these rules I have carefully laid down to you which govern profits as damages. That is, it is Mr. Champlin's duty to prove to you and to satisfy you that all the elements making up these alleged profits are present here, including the element of the cracking plant; and I confess I am somewhat at a loss to know where to

place this cracking plant—I should have said treating plant—change that—in both instances—the treating plant. Of course we know all about the cracking plant. That would work at any time efficiently and is doubtless a good plant. But, as I understand it, in order to get these results, a treating plant was supposed to be in operation. Like this—now—that is to say, he complains that he didn't have this treating tower during that period. Now, if he had it, how could we figure what it was worth as an element—as a profit-making element? I must confess I fail to see where it would fit into the picture and comply with those rules I have laid down; but I may be mistaken in my view of it. You are practicable men, and I want you to consider whether or not you can make up, under these rules I have laid down to you, any figures that will satisfy your minds that will compensate Mr. Champlin for his alleged loss under his contract as claimed under these circumstances."

[fol. 818] Defendant seasonably excepted to this portion of the charge and the exception was duly allowed by the Court.

Exception No. 3. In that portion of its charge to the jury relating to damages sustained by defendant, in referring specifically to defendant's duty to minimize the damages by using the cracking plant without the treater, the Court used the following language:

"The cracking plant was there. It has some value. It can be used for certain other angles, without this particular kind of a treater, and it was Mr. Champlin's duty to minimize these damages as much as possible, if there are any.

"It is his duty to show to you what that plant did earn and pay, and as a matter of fact, what was the result? Was it operated at a loss? I don't think it was shut down entirely, and whatever that was of course would be deducted from whatever this gross amount here is that it is claimed. So it is up to you to discover whether you can by applying any of these rules figure out any problem as a part of these damages. If you figure out any at all, it must be with the distinct thought that that must be entirely covered by these rules and nothing else in the course of the figuring."

Defendant seasonably excepted to this portion of the charge and its exception was duly allowed by the Court.

Exception No. 4. In that portion of its charge to the jury relating to defendant's claim that it could recover for the extra expense it incurred in installing a treater of its own, together with interest on said amount, the Court used the following language:

"Well, if this treater wasn't any use, they did not have the use of it on their theory that there was a contract and they had to do something else, what did they do? They went and bought another plant, bought another kind of a machine, used for the same purpose, and they paid $26,714. They put in a chlorine plant which cost $6,800. That made $33,500. They figure that during the time of the life of that particular treating system or what was used in lieu of a treating system, the chlorine treatment, there will be depreciation of the whole thing in some series of time, and [fol. 819] that is figured to be $20,175. They add those two together and they take from it the estimated cost of this treater that they claim they were entitled to, and that would leave, not minding interest, which I shall eliminate, about $32,000 on the basis that they were entitled to this treater and didn't get it, and had to buy something, the best they could at the time, to take its place."

Defendant seasonably excepted to this portion of the charge and its exception was duly allowed by the Court.

Exception No. 5. In that portion of its charge to the jury relating to defendant's claim that it could recover damages for depreciation on its plant during the time it was shut down by reason of plaintiff's failure to install treater as agreed, with interest on same, and defendant's claim that it could recover for the cost of the treating towers defendant installed, the Court used the following language:

"Then there is another feature that they advance, and that is to the effect that there was a certain depreciation of this plant on account of their deprivation of this use, which they figure from March 24th to October 8th, 1927. They figure it $56,000, and that is figured on the basis that they paid an income tax unit that the government allowed, there was a depreciation of 25%. Now then of course they ask

interest which I have disallowed, and they ask the total cost of the treating towers which they put up which they say they lost entirely, but I can hardly see how they can charge the whole cost of the treating towers under those circumstances."

Defendant seasonably excepted to this portion of the charge and its exception was duly allowed by the Court.

Exception No. 6. In that portion of its charge to the jury relating to the damages sustained by the defendant, in referring to damages sustained by reason of depreciation on the plant when it was shut down, the Court used the following language:

"Well, now of course if they were entitled to any depreciation or any damages based upon depreciation, that must be because there was no other element entering into the matter, but the plant of course would be used, I take it, for [fol. 820] something. There is no reason why the plaintiff here, the Gasoline Company, should be charged with the total depreciation without some offset. You must discover and decide what, if anything, Mr. Champlin could have done to have made use of this plant and caused it to pay something to help out on any loss he would sustain. The evidence is there before you. I do not recollect now the details of it, but I must assume that you do, and you must use your judgment in considering not only that but any details of the four or five plans which Dr. Cross said could have been used in this very way to minimize the damages."

Defendant seasonably excepted to this portion of the charge and its exception was duly allowed by the Court.

Exception No. 7. In that portion of its charge to the jury relating to the damages to be recovered by the defendant, in referring to defendant's claim that plaintiff through itself or its agents represented what the treater would do and what profits could be made, if defendant purchased a Cross cracking plant and treater of the plaintiff, the Court used the following language:

"There is one matter that occurred to me as I was going over this that I overlooked, and that is this: It seems to me that the parties, at least the defendant, the Champlin Com-

pany, in their view of the case, in their theory and evidence, rather assumed that there was a warranty that this treater would do something, would accomplish certain results, but as I understand it, there is no warranty that this treater would do anything except there is a statement of what would be a warranty in this letter of February 5th, to the effect, I believe, that if it was—well, I will leave that to you. There was not to be any payment for this treater in case it was not satisfactory, and the word 'satisfactory' was defined. You take a contract, make any kind of a claim either for an option or purchase, and put any warranty in writing, that is supposed to be the whole warranty between the parties. No other warranty can be proved. I take it that is the only warranty here. So I take it there is no warranty on the part of the Gasoline Company that this [fol. 821] machine would be useful for anything. That it would do—I will take that out—no warranty it would do any particular thing or accomplish any particular result. I think the testimony has been rather vague upon the fact that it would do what people hoped it would do."

Defendant seasonably excepted to this portion of the charge and its exception was duly allowed by the Court.

Exception No. 8. At the trial the defendant seasonably requested the Court to instruct the jury as follows:

Requested Instruction No. 10. "If you find for the defendant in accordance with instructions previously given you, and find that the defendant is entitled to recover for loss of profits sustained by it in accordance with instructions previously given you as to when profits may be recovered, I then instruct you that the defendant is entitled to recover the profits which it would have made if plaintiff had given defendant what it agreed to from the time the treating towers should have been erected by the plaintiff up to the time the defendant should have erected its own treating system to replace that which plaintiff failed to erect, together with interest on those profits from the date plaintiff was first apprised of defendant's claim to the present time, plus the extra expense incurred by the defendant in erecting treating towers of its own, together with interest on the cost of said towers from the date when plaintiff was first apprised of defendant's claim."

The Court gave the instruction but modified it by excluding the matter of interest, as appears by the following language:

"I do not give you instructions in regard to interest; I think they are not entitled to any interest, and I do give you the other instructions subject to the rules already given you."

Defendant seasonably excepted to the refusal to charge as requested and its exception was duly allowed by the Court.

Exception No. 9. In that portion of its charge to the jury relating to the damage sustained by the defendant and its claim for loss of profits sustained, the Court used the following language:

[fol. 822] "That is, that to have any damages they must be such as are not in any degree uncertain, speculative, contingent or conjectural."

Defendant seasonably excepted to this portion of the charge and its exception was duly allowed by the Court.

Exception No. 10. The defendant further requested the Court to instruct the jury as follows:

Requested Instruction No. 11. "If you find, in accordance with instructions previously given you, that the defendant is entitled to recover for loss of profits, I then instruct you that it is entitled to recover its loss of profits sustained from the 20th day of September, 1926, when the cracking plant was finished and ready to operate, up to February 23, 1927, when defendant finished construction of its own towers, together with interest on that amount to April 25, 1929, plus the costs of erection and installation by the defendant of its own treating towers, and interest on said amount from May 1, 1929."

The Court refused so to instruct the jury. The defendant seasonably excepted to such refusal and its exception was duly allowed by the Court.

Exception No. 11. The defendant further requested the Court to instruct the jury as follows:

Requested Instruction No. 12. "In considering the question of profits and in that connection whether profits were

in the contemplation of the parties at the time they entered into any contract, if you find they did, it is proper for you to consider the representations made by Mr. Harcourt and by Dr. Cross in their respective letters, if you find they were brought to the attention of the defendant before any contract was actually entered into and relied upon by the defendant."

The Court refused so to instruct the jury. The defendant seasonably excepted to such refusal and its exception was duly allowed by the Court.

Exception No: 12. The defendant further requested the Court to instruct the jury as follows:

[fol. 823] Requested Instruction No. 13. "If you find for the defendant, but you find that defendant is not entitled to recover its loss of profits in accordance with instructions previously given you, because said profits were not in the contemplation of the parties or are remote and speculative and cannot be by you reasonably ascertained, I then instruct you that defendant is entitled to recover a depreciation on its cracking plant in such amount as you find the evidence warrants, interest on the cost of the Cracking Plant, cost of its own treating towers and interest thereon."

The Court refused so to instruct the jury. The defendant seasonably excepted to such refusal and its exception was duly allowed by the Court.

Exception No. 13. After the jury had been deliberating for some hours they returned with a request for further instructions on the question of damages, and the Court in instructing them further, in referring to defendant's claim for loss of profits, used the following language:

"The evidence, I regret to say, seems to me in many cases is very difficult to use as a basis for such damages without a certain amount of conjecture, etc., but that is not your fault nor mine. The burden of proof is on the Champlin Company to show you what the damages are. If they cannot show you, it is not your fault. So far as they can show you and you can apply these rules that I speak of satisfactorily and get a satisfactory result, then they are

entitled to the result, to those damages, provided you get to that point, as I assume you have."

Defendant seasonably excepted to this portion of the Court's supplemental charge and its exception was duly allowed.

The defendant now presents this its Bill of Exceptions and prays that the same may be allowed. The declaration and all other pleadings, the evidence, the exhibits, the re-[fol. 824] quests for instructions to the jury and all the Court's charge to the jury are made a part of these exceptions.

Champlin Refining Company, by its Attorneys, McKeever, Elam & Stewart, Harry O. Glasser, Beane & Beane, Bradley, Linnell & Jones.

Portland, Maine, May 27th, 1929.

Seen and agreed to as to form.

Taylor, Blanc, Capron & Marsh, R. A., Verrill, Hale, Booth & Ives, Attorneys for Gasoline Products Company, Inc.

Allowance of Exceptions

Exceptions allowed this 10th day of June, A. D. 1929.

John A. Peters, Judge United States District Court.

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In United States District Court

Plaintiff's Motion for Special Judgment—Filed September 4, 1929

Now comes the plaintiff in the above entitled cause and moves that special judgment be entered in its behalf as of September 3, 1929, for the sum of $20,549.97 damage, together with costs in the sum of $2,016.54 and interest in the sum of $466.34, being a total of $23,032.85.

By its Attorneys, Taylor, Blanc, Capron & Marsh, Verrill, Hale, Booth & Ives.

August 30, 1929.

Seen and Agreed to.

McKeever, Elam & Stewart, Harry O. Glasser, Beane & Beane, Bradley, Linnell & Jones, Attorneys for the Defendant.

[fol. 825] IN UNITED STATES DISTRICT COURT

JUDGMENT

It is now, therefore, considered by the Court and ordered that the plaintiff recover of the defendant the sum of $20,549.97 damage, together with costs taxed at $2,016.54 and interest in the sum of $466.34, being a total of $23,032.85.

John A. Peters, United States District Judge.

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IN UNITED STATES DISTRICT COURT

PLAINTIFF'S NOTICE OF APPEAL—Filed September 6, 1929

Messrs. McKeever, Moore & Elam, Enid, Oklahoma; Harry O. Glasser, Esq., Enid, Oklahoma; Messrs. Beane & Beane, Alden Building, Augusta, Maine; Messrs. Bradley, Linnell & Jones, 5 Temple Street, Portland, Maine, Attorneys for Champlin Refining Company.

DEAR SIRS: This is to give notice that Gasoline Products Company, Inc., appeals from the judgment of the United States District Court for the District of Maine, Southern Division, rendered in its favor on September 3, 1929, in the suit brought by said Gasoline Products Company, Inc., vs. Champlin Refining Company.

Gasoline Products Company, Inc., by Taylor, Blanc, Capron & Marsh and Verrill, Hale, Booth & Ives, Its Attorneys.

I, Robert Hale, a member of the firm of Verrill, Hale, Booth & Ives, certify that on the sixth day of September, 1929, I delivered in hand to Carl C. Jones, one of the attorneys of record for said Champlin Refining Company, a notice of appeal of which the above is a true copy.

Robert Hale.

Subscribed and sworn to before me this sixth day of September, 1929. Carl C. Jones, Notary Public. (Seal.)

[fol. 826] IN UNITED STATES DISTRICT COURT

DEFENDANT'S NOTICE OF APPEAL—Filed September 6, 1929

To Taylor, Blanc, Capron & Marsh, New York, N. Y.; Verrill, Hale, Booth & Ives, Portland, Maine, Attorneys for Gasoline Products Co., Inc.

DEAR SIRS: This is to give notice that the defendant in the above case claims an appeal from the entry of judgment dated September 3, 1929, against the defendant and in favor of the plaintiff, and from the rulings, instructions, and refusals to instruct of the District Court.

Champlin Refining Company, by McKeever, Elam & Stewart, Harry O. Glasser, Emery O. Beane, Bradley, Linnell & Jones, Its Attorneys.

I, Carl C. Jones, a member of the firm of Bradley, Linnell & Jones, certify that on the sixth day of September, 1929, I delivered in hand to Robert Hale, one of the attorneys of record for the plaintiff, a notice of appeal, of which the above is a true copy.

Carl C. Jones.

Subscribed and sworn to before me this sixth day of September, 1929. Clarence A. Brown, Notary Public. (Seal.)

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IN UNITED STATES DISTRICT COURT

PLAINTIFF'S PETITION FOR APPEAL—Filed September 6, 1929

To the Honorable John A. Peters, Judge of said Court:

Now comes plaintiff, Gasoline Products Company, Inc., by Taylor, Blanc, Capron & Marsh and Verrill, Hale, Booth [fol. 827] & Ives, its attorneys, and feeling itself aggrieved by a final judgment of this Court entered on the third day of September, 1929, hereby prays that an appeal may be allowed to it from the said judgment to the Circuit Court of Appeals for the First Circuit and in connection with this petition petitioner herewith presents its assignment of errors.

Taylor, Blanc, Capron & Marsh, Verrill, Hale, Booth & Ives, Attorneys for Plaintiff.

Allowance of Appeal

Petition allowed.
September 6, 1929.
John A. Peters, United States District Judge.

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In United States District Court

Defendant's Petition for Appeal—Filed September 12, 1929

To the Honorable John A. Peters, Judge of said Court:

Now comes defendant, Champlin Refining Company, and says that on the third day of September, A. D. 1929, this court entered judgment in the above case in favor of the plaintiff and against the defendant in which judgment, and the proceedings had prior thereto in this cause, certain errors were committed to the prejudice of the defendant, all of which will in detail appear from the assignment of errors which is filed with this petition.

Wherefore, the defendant, for the reasons set forth in this assignment of errors filed herewith, prays that its appeal may be allowed for the correction of the errors so complained of, that a citation may be issued as provided by law, and a transcript of the record, proceedings and papers [fol. 828] duly authenticated may be sent to the United States Circuit Court of Appeals for the first circuit sitting at Boston under the rules of said court in such cases made and provided.

Champlin Refining Company, by McKeever, Elam & Stewart, Harry O. Glasser, Emery A. Beane, Bradley, Linnell & Jones, Its Attorneys.

Allowance of Appeal

Petition granted, appeal allowed.
John A. Peters, United States District Judge.
September 11, 1929.

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In United States District Court

Plaintiff's Assignment of Errors—Filed September 6, 1929

Now comes Gasoline Products Company, Inc., plaintiff in the above entitled cause, by its attorneys, Taylor, Blanc,

Capron & Marsh and Verrill, Hale, Booth & Ives, and appeals from the judgment entered in its behalf and in connection with said papeal assigns the following errors which said plaintiff avers occurred during the trial of said cause and upon which plaintiff relies to reverse the judgment entered herein as appears by the record.

Assignment I

The Court erred in denying the plaintiff's motion made at the close of all the testimony to direct a verdict in behalf of the plaintiff in the sum of $61,530.51.

Assignment II

The Court erred in admitting in evidence over the objections and exception of the plaintiff testimony regarding [fol. 829] the loss of prospective profits as more fully appears from the following excerpts from the testimony:

"Mr. McKeever: Now, if the Court please, under our arrangement, the principal purpose of this testimony will be directed toward the proof of the measure of damages—

The Court (interrupting:) Yes. That is, from this point on your proof will be directed toward the point of damages based on lost profits; or until further notified.

Mr. McKeever: Yes. And I was about to say that there may be some questions—some general questions—that are general in their nature, and when the auditor comes with the figures it will then divide itself absolutely.

Mr. Hale: And it is understood that all questions relating to loss of prospective profits are objected to by the plaintiff, and the plaintiff's rights protected.

The Court: Yes. They are admitted against your objection, and you are allowed an exception."

* * * * * * * * *

"Yes. Now I will have the reporter mark the tabulation sheet and identify it as Defendant's Exhibit 61, that it might be offered in evidence and made a part of the record for the benefit of Court and jury and counsel.

Mr. Marsh: You understand, sir, that all this tabulation and all this testimony is subject to the same objection that we have discussed before?

The Court: Yes.
Mr. McKeever: Yes. I so understand it."

* * * * * * * *

By Mr. McKeever:

"Q. Now, Mr. Leverton, have you compiled any figures to determine the cost of the operation of what is commonly called here the chlorine plant?

Mr. Marsh: I understand that this line of questioning is still subject to our continuing objection.

The Court: Is this on the question of damages?

Mr. McKeever: On the question of damages, and I should announce that this now will be a separate element from what it has been heretofore, to keep them separated.

[fol. 830] Mr. Marsh: We make the same objection, Your Honor.

The Court: Admitted.

Mr. Marsh: Exception.

(Exception noted for plaintiff)."

## Assignment III

The court erred in refusing to instruct the jury as requested in the plaintiff's twelfth request for rulings of law as follows:

"There is no evidence of any damage whatever having been sustained by the defendant from the plaintiff's alleged breach of the alleged contract for the installation of treating towers."

## Assignment IV

The Court erred in refusing to instruct the jury as requested in the plaintiff's fifteenth request for rulings of law as follows:

"Upon all the evidence, no special circumstances were communicated to the plaintiff by the defendant at the time of making of the alleged contract for furnishing a treating tower or towers which would permit the recovery of anticipated profits for the breach of such a contract, if made."

Assignment V

The Court erred in refusing to instruct the jury as requested in the plaintiff's twentieth request for rulings of law as follows:

"On all the evidence defendant has failed to prove that it sustained any loss as a proximate result of plaintiff's alleged breach of contract."

Assignment VI

The Court erred in refusing to instruct the jury as requested in the plaintiff's twenty-first request for rulings of law as follows:

"Defendant has failed to prove what profits would have been realized had the alleged contract been performed."

Wherefore the plaintiff prays that the judgment of the District Court be set aside.

Gasoline Products Company, Inc., by Taylor, Blanc, Capron & Marsh, Verrill, Hale, Booth & Ives, Its Attorneys.

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[fol. 831] In United States District Court

Defendant's Assignment of Errors—Filed September 12, 1929

And now comes Champlin Refining Company, defendant in the above entitled action in connection with and as a part of its petition for appeal, and assigns the following errors which it avers were committed by the District Court in its rulings, orders, instructions, and refusals to instruct in said cause, and upon which defendant relies to reverse the judgment entered herein, as appears by the record.

Assignment of Error No. 1

The Court erred in instructing the jury that in computing defendant's damages, interest could not be allowed, as fully appears in the foregoing Bill of Exceptions under Exception No. 1.

Assignment of Error No. 2

The Court erred in instructing the jury relative to damages that defendant could not recover for any loss of profits from failure to install the treating plant, and in the language therein used, as fully appears in the foregoing Bill of Exceptions under Exception No. 2.

Assignment of Error No. 3

The Court erred in instructing the jury relative to damages, that the cracking plant could be used without the treater, that it was Mr. Champlin's duty to so use it, and to prove what the cracking plant would earn and pay without the treater, and that that amount should be deducted from the gross amount claimed to be due, as fully appears in the foregoing Bill of Exceptions under Exception No. 3.

Assignment of Error No. 4

The Court erred in instructing the jury relative to damages, that defendant could not recover for the extra expense incurred in installing a treater of its own, together with interest on said amount, as fully appears in the foregoing Bill of Exceptions under Exception No. 4.

[fol. 832] Assignment of Error No. 5

The Court erred in instructing the jury on the question of damages that defendant could not recover the extra cost of the treating towers installed by defendant, plus interest on said amount, and for depreciation on the plant while it was shut down, as fully appears in the foregoing Bill of Exceptions under Exception No. 5.

Assignment of Error No. 6

The Court erred in instructing the jury that the defendant could not recover damages on account of depreciation on its plant while it was shut down, without deducting what amount the plant would have earned if it had been used for some other purpose, which was defendant's duty, as fully appears in the foregoing Bill of Exceptions under Exception No. 6.

Assignment of Error No. 7

The Court erred in instructing the jury that there was no warranty that the treater would do any particular thing or accomplish any particular result upon which defendant could rely, and on the language therein used, as fully appears in the foregoing Bill of Exceptions under Exception No. 7.

Assignment of Error No. 8

The Court erred in refusing to instruct the jury as requested in defendant's requested Instruction No. 10, except in modified form by excluding the matter of interest, as fully appears in the foregoing Bill of Exceptions under Exception No. 8.

Assignment of Error No. 9

The Court erred in instructing the jury that defendant could not recover from loss of profits if they were in any degree uncertain, speculative, contingent, or conjectural, as fully appears in the foregoing Bill of Exceptions under Exception No. 9.

Assignment of Error No. 10

The Court erred in refusing to instruct the jury as requested in defendant's requested Instruction No. 11, as fully appears in the foregoing Bill of Exceptions under Exception No. 10.

[fols. 833 & 834] Assignment of Error No. 11

The Court erred in refusing to instruct the jury as requested in defendant's requested Instruction No. 12, as fully appears in the foregoing Bill of Exceptions under Exception No. 11.

Assignment of Error No. 12

The Court erred in refusing to instruct the jury as requested in defendant's requested Instruction No. 13, as fully appears in the foregoing Bill of Exceptions under Exception No. 12.

Assignment of Error No. 13

The Court erred in instructing the jury on the question of damages that it was very difficult from the evidence to compute loss of profits without a certain amount of conjecture, etc., and in the language therein used, as fully appears in the foregoing Bill of Exceptions under Exception No. 13.

Wherefore the defendant prays that the judgment of the District Court will be reversed.

Champlin Refining Company, by McKeever, Elam & Stewart, Harry O. Glasser, Emery O. Beane, Bradley, Linnell & Jones, Its Attorneys.

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Plaintiff's bond on appeal for $2,000, approved and filed September 14, 1929, omitted in printing.

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[fol. 835] Defendant's bond on appeal for $30,000, approved and filed September 23, 1929, omitted in printing.

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[fol. 836] In United States District Court, District of Maine

No. 1134

Gasoline Products Company, Inc.,

vs.

Champlin Refining Company

Transcript of Docket Entries

1927.

Dec. 16. This case is transferred from the equity docket No. 902 by order of Judge Peters after hearing to transfer.

All papers from 902 equity transferred to this file.

Fee for entry and for final decree paid in No. 902.

1928.

Jan. 26. Motion to substitute Declaration for Bill in Equity filed.

[fol. 837] Order allowing same filed (at foot of motion).

Mar. 1. Notice for trial at April Term filed by plaintiff.

" 5. Plea of General Issue and Counterclaim filed.

" 21. Plaintiff's motion to strike filed. Denied.

Apr. 10. Hearing Peters, J., on motion to strike.
Motion denied. Plaintiff excepts.

" 12. Appearance of Bradley, Linnell & Jones for defendant filed.
Motion to amend pleadings filed by defendant.
Amendment allowed, Peters, J.
Motion by defendant that plaintiff be required to produce upon trial certain documents, letters, etc., enumerated and described in the motion filed.
Hearing ordered thereon for Monday, April 16/28, 7:30 P. M.

" 17. Motion to strike filed.
Motion for specifications filed.

" 18. Second motion to amend pleadings by defendant filed, with motion to strike from the record the defendant's amended plea as filed and allowed. Allowed Peters, J.
Stipulation regarding verdict which may be rendered for the plaintiff, also with respect to evidence to be offered, etc., filed.

" 19. Plaintiff's plea to the declaration in set off contained in defendant's plea filed.

" 20. Motion to strike defendant's account in set off and all testimony offered thereunder filed.
Motion granted—Peters, J.
Defendant's attorneys give notice that they except to the granting of the motion.
Directed verdict for the plaintiff in the sum of One hundred and three thousand and four and 35/100 Dollars ($103,004.35) received and af-
[fol. 838] firmed.

May 7. Defendant's exceptions allowed by Peters, J., filed.

May 9. Notice that defendant appeals dated May 2, 1928, filed by defendant.. Appeal allowed.

" 16. Opinion, Peters, J., allowing expert witness fees during time of trial filed—on petition filed by plaintiff's attorney.

" 22. Motion for special judgment filed and allowed—by Robert Hale.

Judgment for plaintiff:

| | |
|---|---|
| Debt or damage | $103,004.35 |
| Costs | 1,262.34 |
| | $104,266.69 |

" 24. Assignment of errors filed by Carl C. Jones.

June 14. Bond on appeal filed. Citation issued returnable July 14/28.

" 30. Stipulation omitting printing Exhibit 45 (German Patent) filed.

July 14. Time for docketing and filing extended to Aug. 13, 1928.

Aug. 13. Time for docketing and filing extended to Sept. 12, 1928.

" 25. Supersedeas Bond approved and filed.

Sept. 4. Citation, Clerk's Certificate and printed cases forwarded to Clerk Circuit Court of Appeals.

Dec. 11. Case assigned tentatively for April 23, 1929.

1929.

Feb. 5. Mandate from Circuit Court of Appeals reversing decree of this court filed with opinion.

Apr. 22. Deposition of Thomas T. Gray with 3 exhibits filed.

Stipulation regarding taking above deposition filed.

Summons to Emery O. Beane returned executed.

" 23. Stipulation regarding amounts and evidence filed.

Trial beginning at 10 A. M. before a drawn jury as appears in files of the case. Case continued all evidence having concluded on Wednesday,

[fol. 839] May 1st, arguments and charge occupied the court until 4.40 P. M., May 2, 1929, when the case was submitted to the jury who returned their verdict at 11.25 P. M. of May 2, 1929.

Stipulation as to deposition of Thomas T. Gray filed.

Stipulation that the amount due plaintiff under license agreement is $54,058.75 and interest $7,471.81, making the total amount due plaintiff per stipulation $61,530.56.

May 1. Plaintiff files motion for directed verdict.
Motion denied.

" 2. Plaintiff's request for rulings of law filed.
Plaintiff's further request for rulings of law filed.
Defendant's motion to amend its amended pleadings filed.
Motion denied.
Defendant's requested instructions filed.
Verdict received and affirmed as follows:

| | |
|---|---|
| Jury find amount due plaintiff | $61,530.56 |
| and that the amount due defendant on his account in set-off is | 40,980.59 |
| leaving a balance due plaintiff | $20,549.97 |

" 18. Time for filing exceptions extended to and including June 15/29.

" 31. Plaintiff's Bill of Exceptions filed by Robert Hale.

June 15. Defendant's Bill of Exceptions filed by Wm. Linnell.

Sept. 4. Plaintiff's motion for special judgment and order thereon filed.
Judgment for plaintiff for—

| | |
|---|---|
| Debts or damage | $20,549.97 |
| Costs | 2,016.54 |
| Interest | 466.34 |
| Total | $23,032.85 |

" 6. Notice of Appeal given by plaintiff to the defendant filed.

" 6. Plaintiff's assignment of errors filed with Plaintiff's petition for appeal filed and allowed.

[fol. 840] Plaintiff's bond on appeal filed and approved.
Plaintiff's citation on appeal filed, returnable Oct. 13/29.

Plaintiff's præcipe for printing approved by defendant filed.

Sept. 12. Notice of appeal by defendant given to the plaintiff filed.

Defendant's assignment of errors filed, with Defendant's petition for appeal allowed.

" 23. Bond of defendant approved, Peters, J., filed.

Citation of defendant returnable Oct. 21, 1929, signed Peters, J. filed.

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IN UNITED STATES DISTRICT COURT

PRÆCIPE FOR TRANSCRIPT OF RECORD

To the Clerk of the District Court of the United States for the District of Maine, Southern Division:

Please prepare a transcript of the record of the above case and incorporate therein the following:

(1) Plaintiff's motion filed January 26, 1928, to substitute declaration for bill in equity and order granting the same.

(2) Defendant's combined original plea and counterclaim and amendment to the same as used by jury May 2, 1929.

(3) Plaintiff's plea to defendant's declaration in set-off filed April 19, 1928.

(4) Stipulation filed April 23, 1929.

(5) Record of all the testimony.

(6) All exhibits received in evidence.

(7) Plaintiff's motion for directed verdict filed May 1, 1929.

(8) Plaintiff's requests for rulings of law filed May 2, 1929.

(9) Instructions requested by defendant filed May 2, 1929.

(10) Defendant's motion to amend amended pleadings filed May 2, 1929, and denial thereof.

(11) Charges of the District Judge to the jury.

(12) Verdict received and affirmed May 2, 1929.

(13) Agreement for extending time for filing bill of exceptions May 18, 1929.

[fol. 841] (14) Plaintiff's bill of exceptions allowed and filed May 31, 1929.
(15) Defendant's bill of exceptions allowed and filed June 15, 1929.
(16) Motion for special judgment allowed and filed September 4, 1929.
(17) Judgment.
(18) Certified copy of plaintiff's notice of appeal dated September 5, 1929.
(19) Certified copy of defendant's notice of appeal.
(20) Plaintiff's petition for appeal allowed and filed September 9, 1929.
(21) Defendant's petition for appeal allowed and filed September 12, 1929.
(22) Plaintiff's assignment of errors.
(23) Defendant's assignment of errors.
(24) Plaintiff's bond on appeal.
(25) Defendant's bond on appeal.
(26) Citation on behalf of plaintiff.
(27) Citation on behalf of defendant.
(28) Transcript of docket entries.
(29) Præcipe.

Gasoline Products Company, Inc., by Taylor, Blanc, Capron & Marsh, Verrill, Hale, Booth & Ives, Its Attorneys. Champlin Refining Company, by McKeever, Elam & Stewart, Harry O. Glasser, Emery O. Beane, Bradley, Linnell & Jones, Its Attorneys.

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[fol. 842] Plaintiff's citation in usual form showing service on Bradley, Linnell & Jones, omitted in printing.

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[MEMORANDUM.—Orders of enlargement of time for docketing case to and including December 11, 1929, are here omitted. A. L. Charron, Clerk.]

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[fol. 843] Defendant's citation, in usual form, showing service on Verrill, Hale, Booth & Ives, omitted in printing.

[MEMORANDUM—Orders of enlargement of time for docketing case to and including December 11, 1929, are here omitted. A I. Charron, Clerk.]

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[fol. 844] Clerk's certificate to foregoing transcript omitted in printing.

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[fol. 844a] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT, October Term, 1928

No. 2285

CHAMPLIN REFINING COMPANY, Defendant, Appellant,

v.

GASOLINE PRODUCTS COMPANY, Plaintiff, Appellee

Appeal from the District Court of the United States for the District of Maine

Before Bingham, Johnson and Anderson, JJ.

OPINION OF THE COURT—November 30, 1928.

ANDERSON, J.:

As amended, this was a suit at law to recover royalties amounting with interest to $103,004.35, admittedly due under a written contract for a non-exclusive license to use the patented Cross Cracking Process. The defendant (appellant) filed a counter-claim for damages, specified in detail, grounded on an alleged breach of a contemporaneous contract with plaintiff to construct a plant for, and to use, royalty free, the Cross Vapor Phase Treating System. Evidence was received from defendant in support of this counter-claim; plaintiff offered no evidence in reply.

At the close of the defendant's evidence, the court granted plaintiff's motion:

"That said account in set-off be stricken from the record [fol. 844b] and that all testimony offered under and in support of said account in set-off be stricken from the record,

and for ground of its motion the plaintiff sets forth that the testimony offered under and in support of said account in set-off fails to establish any claim or right of action by the defendant herein against the plaintiff herein."

The main question is whether, interpreting defendant's evidence in the light of the surrounding circumstances in the aspect most favorable to defendant, it was entitled to go to the jury. Union Pacific R. R. v. Huxoll, 245 U. S. 535, 539; Gray v. Davis, 294 Fed. 57, 58, and cases cited. This calls for a fairly detailed statement of the situation and the evidence.

Plaintiff is a New York corporation, with its headquarters in New York City. It alleges that it has the right to grant non-exclusive licenses under some eighty named patents,—owned by it, by the Texas Company, by the Standard Oil Company of Indiana, by the Standard Oil Company of New Jersey, by the Standard Development Company, and others,—as well as under future patents to be hereafter acquired by these oil companies,—covering processes and apparatus for treating hydro-carbons. It is a large and responsible concern, carrying on its extensive business in close interrelated affiliation with numerous other corporations.

The defendant is a Maine corporation, producing, refining and marketing petroleum products at Enid, Oklahoma, and vicinity; it has a capacity of about 20,000 barrels of crude oil per day, and an investment of several millions of dollars. Its president and chief executive (apparently its founder) is H. H. Champlin, an experienced and competent business man. Prior to 1926, defendant had for some years been operating an oil skimming plant at Enid, a process under which only part of the gasoline really available in the crude oil is made marketable. "Cracking," and a purifying process to eliminate undesirable odors, colors and elements are necessary for full utilization of the real market values in crude oil.

In 1925 and 1926 a number of patented cracking and purifying processes were in general commercial use, and [fol. 844c] sharply competing for the patronage of such concerns as this defendant. As early as March, 1925, Guy N. Harcourt of the M. W. Kellogg Company submitted orally and in writing to Slater, defendant's superintendent, a list of licensees using the Cross Cracking process, to-

gether with an estimate of the profits obtainable by defendant through using this process. M. W. Kellogg was, as Champlin later testified that he knew, "the erecting company,"—that is the concern that the plaintiff caused to erect plants to use the Cross Cracking process under licenses granted by the plaintiff. The Kellogg Company was also, as might be found from a letter written by plaintiff on November 17, 1926, then the plaintiff's "representative in negotiating license agreements and matters in connection with such agreement."

As plaintiff's counsel themselves state in their brief, "Mr. Harcourt continued during 1925 to communicate with the defendant in an effort to interest it in making an installation of Cross Cracking units." In a letter to President Champlin dated November 27, 1925, signed "The M. W. Kellogg Company, to Guy N. Harcourt," Harcourt says:

"I wanted to call your attention particularly to the Barnsdall installation of the Cross process which they have direct connected to the Gray vapor phase treating towers. They are obtaining 30 plus color directly from the towers. The gasoline passes directly from the cracking plant into the towers and is delivered ready for marketing without any re-running. The Cross process is the only one which can be connected with a vapor phase treating plant in this way."

Harcourt then suggested that Champlin and defendant's superintendent, Slater, see the Barnsdall installation for the Cross Cracking process. This Slater did. Slater also made a general study of various competing processes, such as the Dubbs, and Jenkins, and Holmes-Manley, comparing them with the results achieved by the Cross processes. The general result was a favorable opinion of the Cross processes and devices by both Champlin and Slater.

Again quoting from the plaintiff's brief, which states the fair effect of the parol evidence:

[fol. 844d] "Harcourt was succeeded by P. C. Keith, Jr., in the negotiations with the defendant and some time in January, 1926, Keith and Charles H. Welling, a vice-president of the plaintiff, called on Champlin in Enid, Oklahoma. At this conference the negotiations initiated by

Harcourt for the sale of a Cross cracking plant were continued."

Champlin says:

"I was willing to buy * * * Well, they told me, and Mr. Keith had told me prior to this meeting, that the Cross Development Company had lately developed what they termed a Cross vapor phase treating plant to be used in conjunction with the Cross Cracking plant, and that if I would purchase one of their plants and their royalty agreements that they would give me free from royalty this new plant that the Cross Development Company had just patented. They were to install it and I was to pay for it after it had been in operation successfully * * * Mr. Keith and Mr. Welling told me that they would give me royalty free a Cross Vapor Phase Treating Plant if I would purchase one of their cracking plants and pay for their royalty. That they would install the plant—

By the Court:

Q. Which?

A. The Cross Vapor Phase Treating Plant, and put it in operation and if it worked successfully why then I should pay for it, without—there was to be no profit in the erection, to them in the erection of the Vapor Phase Treating Plant. * * *

As it passed through the Cross Vapor Phase Treating Plant it was to de-colorize it and otherwise make it merchantable. * * *

Well, * * * it was a new process and a great deal cheaper. * * *

Well, it was to be operated conjointly with the cracking plant and the product was to be finished all at one operation whereas in other processes why the synthetic crude had to be run to stills and vaporized and condensed and then further treated with chlorine gas."

On February 6, 1926, Keith, and Harvison, a vice-president of the Kellogg Company, took up the negotiations with Champlin, and Champlin says:

"They proposed to sell me the plant and I finally agreed to accept it. * * * They offered to give me the Cross [fol. 844e] Vapor Phase Treater, Mr. Welling and Mr. Keith, on prior business had offered to give it to me. * * *

Q. When you use the word 'plant' will you identify that?
A. I mean the cracking plant in conjunction with the Cross Vapor Phase Treating Plant. • • •

Well, when they finally left my office they said they would go and prepare contracts, and I should meet them that evening at the Oxford Hotel."

In the evening at the hotel, Champlin, Superintendent Slater, Harvison and Keith present, Harvison and Keith presented four documents, (a) draft of the license agreement now sued upon; (b) draft of contract with the Kellogg Company for the erection of the Cross Cracking plant, at a cost of over $440,000; (c) contract of guaranty by the plaintiff licensor that the plant thus to be installed would do the work effectively; (d) a document reading as follows:

"Enid, Oklahoma, February 6, 1926.

Champlin Refining Company, Enid, Oklahoma.

Attention Mr. H. H. Champlin

DEAR SIR: Directed by Mr. C. H. Welling, Vice-President of the Gasoline Products Company, Inc., we are pleased to outline in this letter their proposition covering the installation of a Cross Vapor Phase System treating tower.

The installation is to be made solely at the expense of the Gasoline Products Company, and no monies are to be paid by the Champlin Refining Company to the Gasoline Products Company until the installation is operating in a satisfactory and feasible manner. The unit shall be said to be satisfactory when the gasoline produced from it has a color, when measured by a standard Saybolt Color Machine as ordinarily used in the refining industry, of twenty-five (25) or better; is sweet to the "doctor" test as ordinarily understood; passes the copper strip corrosion test; and after eight hours' continuous exposure to the sun still has a color of twenty-one or better.

When the installation is functioning in a satisfactory manner the Champlin Refining Company is to reimburse the Gasoline Products Company, for the cost only of the installation.

We are directed to state that the Gasoline Products Company will, in the event that any suits are instituted against [fol. 844f] the Champlin Refining Company for infringement of patents, undertake and assume the defense thereof, the liability of the Gasoline Products Company, however,

being limited to the payment of the court costs as taxed and the compensation and expenses of counsel and experts of is own selection. The Champlin Refining Company shall co-operate fully in the defense of such suits and to that end shall furnish all the evidence in its control. The Champlin Refining Company shall also give the Gasoline Products Company immediate notice of the making of any written claims of infringement.

We are further directed to state that such an installation is to be royalty free as are any other installations which may be made at the Enid, Oklahoma, refinery of the Champlin Refining Company when said installations are used directly in treating of gasoline produced from the Cross process.

Cross Engineering Company, by P. C. Keith, Jr.,
Vive-President.

We may here conveniently note that the terms of the license contract are, on this record, irrelevant, except, possibly, paragraph 15, on which plaintiff grounds a contention dealt with below; that no question here arises under the guaranty contract; that it is relevant only as it bears on the relation of the various concerns involved in this negotiation and resultant transaction; that the paper copied above is, on its face, but a memorandum of the terms of the oral offer made in January by Welling and Keith for the installation of the Cross Treating Tower; that the gist of the present case is whether this oral offer was made by plaintiff's agents and was accepted by defendant.

The February 6 interview ended by Champlin's stating that as soon as he had completed his financial arrangements he would accept plaintiff's offer and sign the contracts. They were left with him by Keith. Pursuant to this arrangement, Champlin wired Keith on February 25; and, on February 26, Keith, alone, came to Enid. Champlin then signed the three contracts, and returned them to Keith. One copy of the memorandum *supra* was kept by Keith; the other by Champlin. Though dated February 26, the written contracts were not in final form delivered until about March 30. Keith had brought them back to [fol. 844g] Champlin at Enid, on March 20, for his assent to a change made by Welling in the license contract. Work by the Kellogg Company on the plant began eight or ten days later after March 30: Champlin says: "They did

all they could to hurry it up and to hurry up the erection of the Cross Cracking plant, but they made no move toward starting the erection of the Cross Vapor Phase Treating plant, and on May 13th I wired * * *"

"Enid, Okla., 13.

Gasoline Products Co., Inc., 52 Broadway, New York, N.Y.:

Wire definite information when we can expect complete plans and specifications of vapor phase treating towers.

Champlin Refg. Co."

Plaintiff replied on May 14:

"Champlin Refining Company, Enid, Oklahoma:

Keith expected here Monday will wire regarding towers after discussion with him.

Gasoline Products Company."

Parenthetically, evidence and lack of evidence as to the dealings between the parties, particularly during the summer of 1926, must be considered in the light of the undisputed fact that a fire in the defendant's office had destroyed "all or nearly all of our letters and letter-files and records." So that, as Champlin stated, "I am dependent on what * * * the Gasoline Products Company, New York City, were kind enough to furnish us."

A little later Keith visited Enid several times and talked with Champlin about the erection of the towers.

On June 10, an estimate with drawings covering these Vapor Phase Treating Towers of the Cross Cracking units was submitted in writing on a letterhead as follows:

[fol. 844h] "Cross Engineering Company (Inc.)

The Engineering Department of the Kansas City Testing Laboratory (Inc.)

Dr. Walter M. Cross, Dr. Roy Cross, P. C. Keith, Jr.

Telephone: Victor 1327

700 Baltimore Ave.,

Kansas City, Mo., June 10th, 1926.

Champlin Refining Co., Enid, Oklahoma.

Attention Mr. P. E. Slater"

The estimated cost of these towers, including labor, was $21,502.

On July 12, Champlin telegraphed Welling as follows:

"Enid, Okla., 12.

C. H. Welling, Vice President Gasoline Products Co., Inc., 52 Broadway, New York, N. Y.:

Mr. Keith on his vacation little or no progress being made on the installation of the Cross Vapor Phase Treating Towers stop Kindly insist on prompt action that the towers may be in by the time the cracking plant is completed.

H. H. Champlin.

Received Jul. 13, 1926, 8.56 a. m.

G. M. P. Murphy & Co."

We find no reply to this telegram.

On July 30, Champlin sent the following telegram:

C. H. Welling, Vice President Gasoline Products Co., Inc., 52 Broadway, New York, N. Y.:

Mr. Keith phones us today nothing done about installation of Vapor Phase Treating Towers stop Cross plant will be ready to try out in fifteen days stop We insist that action be taken at once stop Any delay in starting plant will be expensive.

H. H. Champlin."

We discover no reply to this telegram.

Again on August 2, defendant wired:

"M. W. Kellogg Co., 16 Dey St., New York, N. Y.:

Our Cross cracking plant will be completed within a few days under your contract period nothing is being done toward the installation of the Cross vapor phase treating units period Have wired Mr. Welling but he does not reply period Imperative that something be done that there shall [fol. 844i] not be any delay in starting plant.

Champlin Refining Co."

This evoked from Welling a long letter addressed to Champlin, which purports to state much of the history of the dealings between the parties as to the Cross Vapor Phase Treating process. At the trial, Champlin reviewed

this letter in detail, and denied the accuracy of many of Welling's statements therein. Which version was correct would of course be for the jury. For present purposes the letter must be treated in the aspect most favorable to the defendant. In it there are references to Keith and the previous dealings between Champlin, Keith and Welling, confirmatory of other evidence as to their authority to represent the plaintiff. While there is denial that Champlin accepted the offer of the Cross Vapor System when the other contracts were made (stated by Welling as February 26, 1926), other parts of the letter are at least consistent with Champlin's testimony that he did accept, and with the other evidence indicating that both parties thereafter understood that the Cross Vapor Phase Treating process fell within the scope of the general acceptance of plaintiff's entire offer by Champlin on February 26.

During the next six weeks there were repeated letters and telegrams between the parties, which need not be stated in detail. Champlin adhered to his contention that the plaintiff had made a valid contract with him for the treating towers, and would be liable for the results of failure to have the towers ready to use contemporaneously with the cracking plant. The cracking plant was completed and accepted shortly after the middle of September; but the plaintiff had furnished no treating towers. Thereafter defendant installed its own treating towers, completing them in the following March at a cost of about $30,000, or about $9,000 in excess of the estimated cost of the Cross towers.

We think that the evidence, thus sufficiently, although incompletely, outlined (there is much more supporting defendant's position) shows plainly that defendant was entitled to go to the jury under its counter-claim setting up an oral contract with the plaintiff for the Cross Vapor [fol. 844j] Phase Towers. The real case is a comparatively simple one. It has been unnecessarily confused and complicated, in both courts, by the injection, from both sides, of false and confusing issues. Three written contracts and one oral contract did not, as the defendant contends, make, in technical law, a single contract. The business undertaking,—the transaction,—was doubtless integral (single), in that the plaintiff and defendant agreed, at one time, on everything involved in installing the neces-

sary apparatus and in granting the necessary rights to use both the Cross Cracking process and the Cross Vapor Phase system. But the cracking plant was to be built by the Kellogg Company, and its effectiveness guaranteed by the plaintiff. While the plaintiff and the defendant were clearly the dominant and controlling parties in the entire transaction, defendant's attempt to make four contracts into one simply tends to confuse the real situation.

On the other hand, there is no merit in the plaintiff's contention of insufficient evidence of agency on the part of Welling, Keith and the Kellogg Company, to bind the plaintiff to make a contract for the Cross Vapor Phase Towers. It is plain that months of negotiation culminated, in January, 1926, in an offer made by Welling and Keith to Champlin, to crack and purify the defendant's crude oil by the Cross devices for both cracking and purifying. The evidence would fully warrant a jury in finding that, from that time on, that integral offer was the only proposition considered on either side.

The evidence also warrants a finding that on February 6 Champlin committed the defendant to acceptance of the plaintiff's entire proposition, conditioned only by his financing; and that this condition was removed on February 26, thus leaving the whole offer accepted. The absence of any discussion of any purifying and deodorizing process or device, other than the Cross Vapor Phase, from January until about midsummer, tends strongly to support defendant's contention that both parties understood that the acceptance in February involved the entire proposition made to Champlin in January. The conduct and telegrams of both parties in May, when Champlin first complained of delay in starting the treating towers, might well [fol. 844k] be found to be consistent only with an understanding by both that both were bound, as the defendant claims. Again, in some fashion not very clearly disclosed, tentative steps were taken for the installation of the Cross Vapor Phase Towers during the summer. There was renewed discussion as to the risks of patent litigation, and the operating cost of the Cross system,—evidence which would warrant a jury in finding that since the previous January plaintiff had changed its mind as to the efficiency and economy of the Cross Vapor Phase System, and perhaps as to its legal right to install and use it. Moreover,

a jury would be warranted in considering that under this contract practically all the risk accrued to the plaintiff and no reward; that unless the plant, which would cost something over $20,000, was successful, plaintiff would not even be paid for it; that if successful, plaintiff would receive no royalty. The motive to escape from its obligation and perhaps induce the defendant to install a different and royalty-producing device not involving danger of patent litigation, is obvious, and might be considered by a jury in interpreting the correspondence and the conduct of the plaintiff's representatives. Champlin testified that in July Keith told him the Kellogg people had arranged to be the selling agents of the Gray people, and tried to persuade him to buy the Gray system subject to a royalty.

The memorandum of February 6, quoted above, seems to have confused the parties and their counsel. As already pointed out, it is in nature but a restatement of the offer made by Welling and Keith to Champlin in January. Of course the statements therein are not independent evidence of Keith's agency for the plaintiff. 2 Wigmore Evidence, sec. 1018; 1 Mechem Agency, sec. 285. But as there is other evidence of that agency, his acts within the scope of his agency are competent as part of the *res gestæ*. Attleboro Manufacturing Co. v. Frankfort Ins. Co., 240 Fed. 573, and authorities cited and discussed by Judge Bingham on page 582. Applying the doctrine of that case, the contents of this written memorandum, signed by Keith, become of great significance. He begins the proposal by the phrase:

[fol. 8441] "Directed by Mr. C. H. Welling, Vice-President of the Gasoline Products Company, Inc., we are pleased to outline in this letter their proposition covering the installation of a Cross Vapor Phase System treating tower."

"Their proposition" might well be found by the jury to refer directly to the previous offer made by Welling and Keith to Champlin. The letter proceeds:

"The installation is to be made solely at the expense of the Gasoline Products Company."

not at the expense of the Cross Engineering Company. Thus, it was, in its financial aspect, entirely a Gasoline Products Company undertaking. And the Gasoline Com-

pany, not the Cross Engineering Company, was also to assume the liabilities, that are described in the paper, as to possible patent infringement suits.

Why Keith signed as vice-president of the Cross Engineering Company does not appear, and is probably immaterial. It may be disregarded as a mere *descriptio personæ*. At any rate such signature cannot affect defendant's rights to rely on the oral offer then outstanding from the plaintiff, the terms of which were re-stated in this memorandum, and which oral offer might be found to be accepted when the rest of the general proposition was accepted. But this paper is not a "proposal" from the Cross Engineering Company; it is an "outline" of a "proposition" already made by the Gasoline Products Company.

The jury would also be entitled to attach some significance to the fact that plaintiff's agents undertook to prepare and present to Champlin all the written contracts seemingly deemed by them requisite. Keith and Harvison on February 6 at the hotel made the first drafts. Champlin at no time was called on to do anything but to accept, in the various forms presented, the documents they drafted to cover the entire undertaking. Under such circumstances, the jury would be warranted in finding that the fact that Champlin did not demand a formal written contract covering the Cross Vapor Phase Towers was the natural attitude of a busy man dealing with a large and responsible concern, whose agents he regarded as straightforward and trustworthy. Plainly, Champlin was not [fol. 844m] bound to suspect an attempt to trick his company out of the rights accruing under the offer for the royalty-free, purifying plant,—which, in its general nature, involved risk and expense to the plaintiff and no risk or expense to the defendant. The nature of the proposition makes acceptance an easy and natural inference.

Another point possibly calls for brief discussion. The defendant's argument that the several contracts were, as matter of law, one, is attempted to be met by the plaintiff by the contention that paragraph 15 of the license contract cuts the defendant off from contending that it relied on any contract outside the terms of the license contract itself. That paragraph reads:

"Fifteenth: The making, execution and delivery of this agreement by the Licensee have been induced by no representations, statements, warranties, or agreements other than those herein expressed. This agreement embodies the entire understanding of the parties and there are no further or other agreements or understandings, written or oral, in effect between the parties, relating to the subject matter hereof, except a guarantee of operation contract of even date herewith. This instrument may be amended or modified only by an instrument of equal formality signed by the duly authorized officers of the respective parties."

But as we hold defendant wrong in contending that the various contracts were technically one, it seems hardly necessary to add that we can give no such broad construction to this paragraph as to apply it to matters extrinsic the license contract. This paragraph is intended to buttress rights accruing under the royalty contract,—to cut off defenses otherwise open. But no defense to claims under this contract is now made; it is admitted that plaintiff is entitled to recover every dollar it claims. The issue here is solely as to defendant's right to counter-claim for damages suffered under another contract. The fact that this other contract relates to what is, in important aspects, the same transaction, does not extend this fifteenth paragraph to the destruction of that other contract. Its effect is limited to the contract sued upon.

Finally, plaintiff's learned counsel argue (rather faintly) [fol. 844n] that the damages accruing from the breach of the contract as to the Cross Vapor Phase Towers are not "ascertainable by calculation," and therefore not within the scope of R. S. Maine, chap. 87, sec. 75. It is enough to say that, on the pleadings and the evidence, we cannot say that, as matter of law, damages are not so "ascertainable by calculation."

The evidence indicated that the cracking plant was put in operation and thus became royalty producing to the plaintiff about the middle of September, 1926; that the defendant had no purifying plant until March, 1927, when, at a cost of about $9,000 more than the estimated cost of the Cross towers, it had completed a substitute plant for that process. On this evidence it cannot be assumed that if the plaintiff had installed the Cross System, so as to

have the device ready for operation with the Cross cracking plant, it would not have worked according to representations and thus relieved the defendant of large expenses apparently ascertainable by calculation.

The court below was plainly right in denying the plaintiff's motion to strike from the pleadings the defendant's counter-claim or set-off. This ruling, made before evidence offered, was, after the defendant's evidence was received, reversed for some reason not made clear. It is obvious that the issue, even if regarded as doubtful, might well have been submitted to the jury and thus, even as the case then appeared, have saved the new trial which, under our view of the case, is now found necessary.

But it is clear that the defendant's right of counter-claim or set-off is not to be determined on any narrow or technical construction of the Maine statute as to set-off. In Collins v. Campbell, 97 Me. 23, the Supreme Court of Maine said, p. 25,—"Originally courts of equity alone had jurisdiction in cases of set-off. * * * The right did not exist at common law until introduced into its practice by statute; but being found conducive to the administration of justice it has been greatly extended by legislative enactments and a liberal construction by the courts. And now courts of common law have an equitable jurisdiction in cases of set-off independent of the statute, practically co-[fol. 844o] extensive with that of courts of equity, and opposite demands arising upon judgments may, upon motion, be set off against each other whenever such set-off is equitable. * * * By the exercise of this equitable jurisdiction the courts are enabled to do justice between the parties in cases not strictly within the provisions of the statute. * * * The criterion by which it is to be determined is whether it is equitable."

And in Crummett v. Littlefield, 98 Me. 317, 320, the same learned court said: "The equitable right of set-off is not dependent upon the express provisions of statute, but is derived from the rules of the civil law and founded upon principles of natural equity and justice. In applying the doctrine, courts having general equity jurisdiction exercise more extensive powers than those of the common law, and seek to give effect to the rule in all cases where the peculiar equities intervening between the parties clearly require it," citing and reviewing supporting authorities.

Rodick v. Pineo, 120 Me. 160, 166 et seq., re-asserts the same doctrine of broad and liberal interpretation of the right of set-off, quoting from the language of Mr. Chief Justice Fuller in Scott v. Armstrong, 146 U. S. 499, 507: "The right to assert set-off at law is of statutory creation, but courts of equity from a very early day were accustomed to grant relief in that regard independently as well as in aid of statutes upon the subject."

Peterson Oven Co. v. Fickett, 121 Me. 413, 417 et seq., reiterates the same general doctrine, citing among other authorities an exhaustive opinion by Mr. Justice Peters in Morse v. Moore, 83 Maine, 473. See also The Gloria, 286 Fed. 188, 192, where Circuit Judge Mack deals with the historical development of the doctrine, holding that while originally it was a mere procedural convenience, it has now become "really a requirement of substantive justice."

See also 34 Cyc. 629, 630, 644.

Cf. also R. S. Maine, chap. 86, secs. 80, 81, providing that in cross actions service of writs may be made upon the attorneys of non-resident plaintiffs if the demands are of such a nature that one judgment or execution may be set off against the other. (New Haven Copper Co. v. Brown, 46 Me. 418, 421.)

[fol. 844p] Modern authorities are uniform in holding that the doctrine, although of statutory origin, must be given a broad, liberal and equitable construction.

It would be hard to imagine a case presenting a clearer demand for the application of this general doctrine. We have here an Oklahoma business concern, sued by a New York business concern, in the State of Maine, some 1500 miles away from its real place of business. To deny the defendant a trial, in this suit, of its claim of damages for plaintiff's failure to install the plant of the Cross Vapor Phase System would amount to a denial of justice. The defendant's demand grows out of the same general transaction, although the contracts are distinct. If here under cross suits, plainly judgments would be off-set. We think the same principle is, on this record, here applicable; and justice demands such procedure, even if the defendant's damages are not technically ascertainable by calculation. This case falls under the doctrines clearly laid down by the Supreme Court of New Hampshire. Johnson v. White

Mountain Creamery Ass'n, 68 N. H. 437. We find nothing in the decisions of the Supreme Court of Maine inconsistent with the result there reached.

The judgment of the District Court is reversed, the verdict is set aside and the case is remanded to that court for further proceedings not inconsistent with this opinion; the appellant recovers its costs of appeal.

JOHNSON (dissenting): I agree to all of the above opinion except what is said in the last part in regard to damages to be "ascertained by calculation." As the action is a Maine case the Maine statute in reference to set-offs is binding upon the District Court of Maine. I think that the damages alleged in the claim of set-off can be "ascertained by calculation" by giving a liberal construction to the Maine statute, but do not agree that the Maine statute can be complied with if the damages alleged are not capable of ascertainment, and do not agree that the requirement of the statute in regard to damages is technical.

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[fol. 845] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT, OCTOBER TERM, 1929

No. 2415

GASOLINE PRODUCTS COMPANY, INC., Plaintiff, Appellant,

v.

CHAMPLIN REFINING COMPANY, Defendant, Appellee

No. 2416

CHAMPLIN REFINING COMPANY, Defendant, Appellant,

v.

GASOLINE PRODUCTS COMPANY, INC., Plaintiff, Appellee

Appeals from the District Court of the United States for the District of Maine

Before Bingham, Anderson and Wilson, JJ.

OPINION OF THE COURT—April 7, 1930.

ANDERSON, J.:

On a new trial held pursuant to the decision of this court in 29 Fed. (2d) 331, the amount due the plaintiff for royal-

ties was stipulated, with interest reckoned to April 30, 1929, as $61,530.56. There never was controversy concerning the royalties. The case was tried at length under the defendant's amended counter-claim, in which damages were alleged amounting to $30,316.55. On the issues set up in [fol. 846] this counter-claim, the jury found for the defendant; that a contract for the treating towers was made and broken; and assessed the damages for plaintiff's breach at $40,980.59, resulting in a net verdict of $20,549.97 for the plaintiff. Both parties appealed on questions arising under the counter-claim.

The plaintiff's first assignment is to the court's refusal to direct a verdict for the plaintiff, on the defendant's claim in set-off, on the ground that there was no evidence, for the jury, to support such contract. This may be briefly disposed of. The facts as to the dealings between the parties are stated in substantial length in the former opinion of this court, and need not here be repeated. It is enough now to note that we find in this record no new evidence controlling the fair inferences from the evidence in the former record, substantially repeated at the second trial. In fact, there is more evidence supporting the existence of such a contract as defendant asserts. So far as there is conflict, the question was, of course, for the jury. The questions of the existence and breach of the contract alleged in the counter-claim were plainly for the jury.

In outline, the jury's verdict settled that the transaction, although involving separate contracts for the cracking plant and the treating towers (purifying plant), was an integral, single, transaction; that the defendant acquired from the plaintiff the necessary rights to have both the Cross cracking plant and the Cross vapor phase system. Clearly, also, the jury must have rejected the plaintiff's view of the valuelessness of the treating tower for the contemplated purpose, (purifying the cracked gasoline), involved in the following excerpt from the court's charge:

"Well, now, if it was no good and he" (i. e. the defendant) "did not have it, he could not have suffered any loss for not having the use of it."

It is plain, from the whole course of the dealings between the parties, that the plaintiff's undertaking was to furnish means for the defendant to make an increased part of its

crude oil marketable in order that it might thereby derive profits. The defendant's claim for damages falls, there-
[fol. 847] fore, within those cases which hold that, if profits were in the contemplation of the parties and there is shown some rational basis for determining such profits, they may be recovered as damages. Central Coal & Coke Co. v. Hartman, 111 Fed. 98; Bishop-Babson-Becker Co. v. Estes Drug Co., 63 Okla. 117; Stearnes Co. v. Robins, 114 Okla. 156; Gagnon v. Sperry & Hutchinson Co., 206 Mass. 547; Armstrong v. Bangor Mill Supply Corp., 127 Me. 194, 145 Atl. 741; Waukeag Ferry Assoc. v. Arey, Me., 146 Atl. 10; Eastman Kodak Co. v. Southern Photo Materials Co., 273 U. S. 359.

It follows that the plaintiff's assignments 2 to 6 are without merit; the case was for the jury in all its aspects. The judgment must be affirmed unless there was reversible error on some point of law affecting the jury's verdict on damages.

Defendant's main contention was that the plaintiff was obligated to furnish it an adequate purifying system contemporaneously with the cracking system. The cracking system was completed about September 20, 1926, and put in immediate and successful operation. Plaintiff furnished no purifying system. Consequently, the defendant was required to supply itself with a substitute therefor. It contends that it did that, with proper promptness and efficiency, and got its substitute ready to use about February 20, 1927.

Its main claims for damages, then, are the excess cost of its substitute system, about $32,000, plus the profits it reckons it would have made in the period, from September 20 to February 20. These profits are figured in detail by defendant's auditor in Exhibit 61 at $179,459.14.

Plaintiff challenged the defendant's evidence on damages at practically every point. It stoutly claimed that the defendant did not seasonably and efficiently take steps to minimize the damage done by the breach of contract relied upon. Plainly, there was evidence warranting the view that in August, 1926, the defendant ought to have known that the plaintiff intended to deny any obligation to furnish the Cross purifying system, and that defendant must take proper steps for a substitute. Yet it did nothing effective

as to supplying a substitute system until late September or October and still later changed its plans. It had, as already [fol. 848] noted, no substitute system ready for operation until February 20, 1927. The plaintiff also offered evidence that other methods or processes than the one actually adopted by defendant were available for purifying, and might have been installed much earlier than February, 1927. The jury were fully warranted in cutting down the time, during which the defendant was entitled to claim lost profits as damages, to much less than the five months period used by defendant's auditor in the elaborate computation, Exhibit 61. Plaintiff also attacked other aspects of defendant's computation of lost profits.

We observe, generally, that the amount of defendant's damage was peculiarly a question of fact for the jury, to be determined on very conflicting evidence. It is not surprising that the jury found no persuasive case made out for damages approximating the defendant's claim of over $300,000. On the other hand, it is equally clear that the defendant did, on the weight of evidence, make out a claim for a substantial sum of lost profits as damages.

The defendant alleges prejudicial error in the instruction to the jury, "That to have any damages they must be such as are not in any degree uncertain, speculative, contingent or conjectural."

This ruling was made at least twice. Near the close of the long charge the court read to the jury the defendant's seventh request as follows:

"If you find for the defendant, in accordance with the instructions previously given you, I instruct you that defendant is entitled to recover all the damages which are the natural and probable consequence of plaintiff's breach of contract, and all damages which the parties should reasonably anticipate would result from a breach of contract by the plaintiff, and in this respect I instruct you that the defendant would be entitled to recover all the profits which it lost by reason of plaintiff's breach of contract, if you find that profits were in the contemplation of the parties when the contract was entered into and that the profits claimed are not remote nor speculative but are capable of reliable measurement, that is, can be ascertained by you with a reasonable degree of certainty."

He then added:

[fol. 849] "That is in substance what I have already told you, and, further, I will instruct you that they must be in no degree conjectural. That word was omitted from the instruction."

After the jury had been out for some hours, they returned and asked for further instructions on damages. In complying, the court said, inter alia:

"Now there is one important feature of the rule that applies all along the line in all cases. That is, that to have any damages they must be such as are not in any degree uncertain, speculative, contingent, or conjectural."

The jury were thus, after they had indicated their general conclusion in favor of the defendant, emphatically told that any degree of uncertainty would cut off the defendant's claims for damages. Under such circumstances, we cannot say the jury were not misled. Only reasonable certainty is requisite. 1 Sedgwick Damages (9th Ed.) s. 176. The 7th request was a correct statement of the law. In Eastman Kodak Co. v. Southern Photo Co., ubi supra, the Supreme Court approved this instruction:

"Damages are not rendered uncertain because they cannot be calculated with absolute exactness. It is sufficient if a reasonable basis of computation is afforded although the result is only approximate."

Compare Malone v. Hastings, 193 Fed. 1; Central Coal & Coke Co. v. Hartman, ubi supra. The verdict of only $40,980.59 cannot, on the evidence, be reconciled with any very substantial allowance of profits.

The defendant also complains that the court disallowed its claim for interest on its damages.

Undoubtedly, the general rule is that interest is not allowed on unliquidated damages; but, on the other hand, "When necessary in order to arrive at a fair compensation, the court in the exercise of a sound discretion may include interest or its equivalent as an element of damages." Miller v. Robertson, 266 U. S. 243 at 258, and cases cited. See also Barrett Co. v. Panther Rubber Mfg. Co., 24 Fed. (2d)

329, 337, and cases cited. The ruling against any allowance of interest was broad and general.

[fol. 850] The plaintiff's claim is for an undisputed amount of royalties. The defendant claims in set-off the excess cost of its substitute purifying plant, as stated above, and a large amount of lost profits; it withheld payment of substantial amounts of admittedly due royalties, pending the determination of the amount of its claim in set-off. Consequently, the plaintiff has collected, or now gets judgment for, a large amount of interest on the undisputed amount of royalties due.

We think that the jury should have been instructed to allow interest on any excess cost of any substitute purifier, which the jury found as an element of damages, from the date when the substitute purifier was furnished or should have been furnished; (St. Paul Fire & Marine Ins. Co. v. Robison, 72 Okla. 269) and also might, in their discretion, in order to do full justice between the parties, allow interest on any amount of lost profits which they found due the defendant by reason of plaintiff's breach of contract.

We find no other assignment calling for discussion.

The result is:

The judgment of the District Court is vacated, the verdict set aside and the case stands for a new trial, on defendant's damages only, with costs to the Champlin Refining Company.

WILSON, J.:

I concur in the reasons for sending this case back for further hearing on the question of the defendant's damages, but do not care to be understood as thereby approving the view that the defendant's claim is a proper account in set-off under section 75 of Chapter 87 of the Maine Statutes.

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[fol. 851] On January 7 and 8, 1930, these cases come to be heard, and were fully heard by the court, Honorable George H. Bingham, Honorable George W. Anderson, and Honorable Scott Wilson, Circuit Judges, sitting.

Thereafter, to wit, on April 7, 1930, the opinion of the court (page 845) was filed and the following judgment was entered in each case:

IN UNITED STATES CIRCUIT COURT OF APPEALS

JUDGMENT—April 7, 1930

This cause came on to be heard January 7 and 8, 1930, upon the transcript of record of the District Court of the United States for the District of Maine, and was argued by counsel.

Upon consideration whereof, It is now, to wit, April 7, 1930, here ordered, adjudged and decreed as follows: The judgment of the District Court is vacated, the verdict set aside and the case stands for a new trial on defendant's damages only, with costs to the Champlin Refining Company.

By the Court.

Arthur I. Charron, Clerk.

---

Thereafter, to wit, on May 6, 1930, the following Petition for Rehearing was filed in each case:

IN UNITED STATES CIRCUIT COURT OF APPEALS

PETITION FOR REHEARING—Filed May 6, 1930.

To the Honorable the Judges of the United States Circuit Court of Appeals for the First Circuit:

Now comes Gasoline Products Company, Inc., plaintiff-appellant and plaintiff-appellee, petitioner for rehearing, and respectfully represents that it has been and is aggrieved by a decision of this court rendered April 7, 1930, in the above-entitled cause and, without waiving any points contained in its brief heretofore filed, hereby prays that a rehearing may be allowed and in support of this petition the petitioner presents the following grounds on which the said petition is based:

(1) Because justice requires that if a new trial be had it be had upon all the issues of the case.

[fol. 852] (2) Because the court has erred in applying the Oklahoma rule on the allowance of interest on unliquidated damages.

(3) Because the errors found by this court in the trial below are not such as to justify any retrial of the case.

Wherefore your petitioner respectfully prays that said opnion be withdrawn and that a rehearing be granted by this Honorable Court and that until this petition shall have been acted upon by this Honorable Court no mandate shall issue pursuant to the decision herein.

Gasoline Products Company, Inc., by Taylor, Blanc, Capron & Marsh, Verrill, Hale, Booth & Ives, Its Attorneys.

Certificate

The undersigned, John B. Marsh and Robert Hale, each an attorney regularly admitted to practice in the United States Circuit Court of Appeals for the First Circuit, and each an attorney for the above-named Gasoline Products Company, Inc., plaintiff-appellant, plaintiff-appellee, and petitioner for rehearing, each certifies that in his opinion the foregoing petition for rehearing in the case of Gasoline Products Company, Inc., plaintiff-appellant, plaintiff-appellee, v. Champlin Refining Company, defendant-appellee, defendant-appellant, Nos. 2415 and 2416, is well founded and is not presented for the purpose of obtaining delay.

John B. Marsh, Robert Hale.

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Thereafter, to wit, on May 21, 1930, the following Orders of Court were entered in each case:

In United States Circuit Court of Appeals

Order Amending Judgment—May 21, 1930.

It is ordered that the judgment entered on April 7, 1930, be, and the same hereby is, amended to read as follows: "The judgment of the District Court is vacated, and the verdict is set aside only as to damages, and the case is [fol. 853] remanded to that court for a new trial on the question of defendant's damages, with costs to the Cha-plin Refining Company."

By the Court:

Arthur I. Charron, Clerk.

IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER DENYING REHEARING—May 21, 1930.

No judge who concurred in the judgment entered April 7, 1930, as amended May 21, 1930, desiring a rehearing, it is ordered that the petition for rehearing filed May 6, 1930, be, and the same hereby is, denied.

By the Court.

Arthur I. Charron, Clerk.

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Clerk's certificate to foregoing transcript omitted in printing.

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[fol. 854] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 20, 1930

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit is granted, the briefs and argument to be limited to the question whether the United States Circuit Court of Appeals erred in limiting the new trial to the question of damages.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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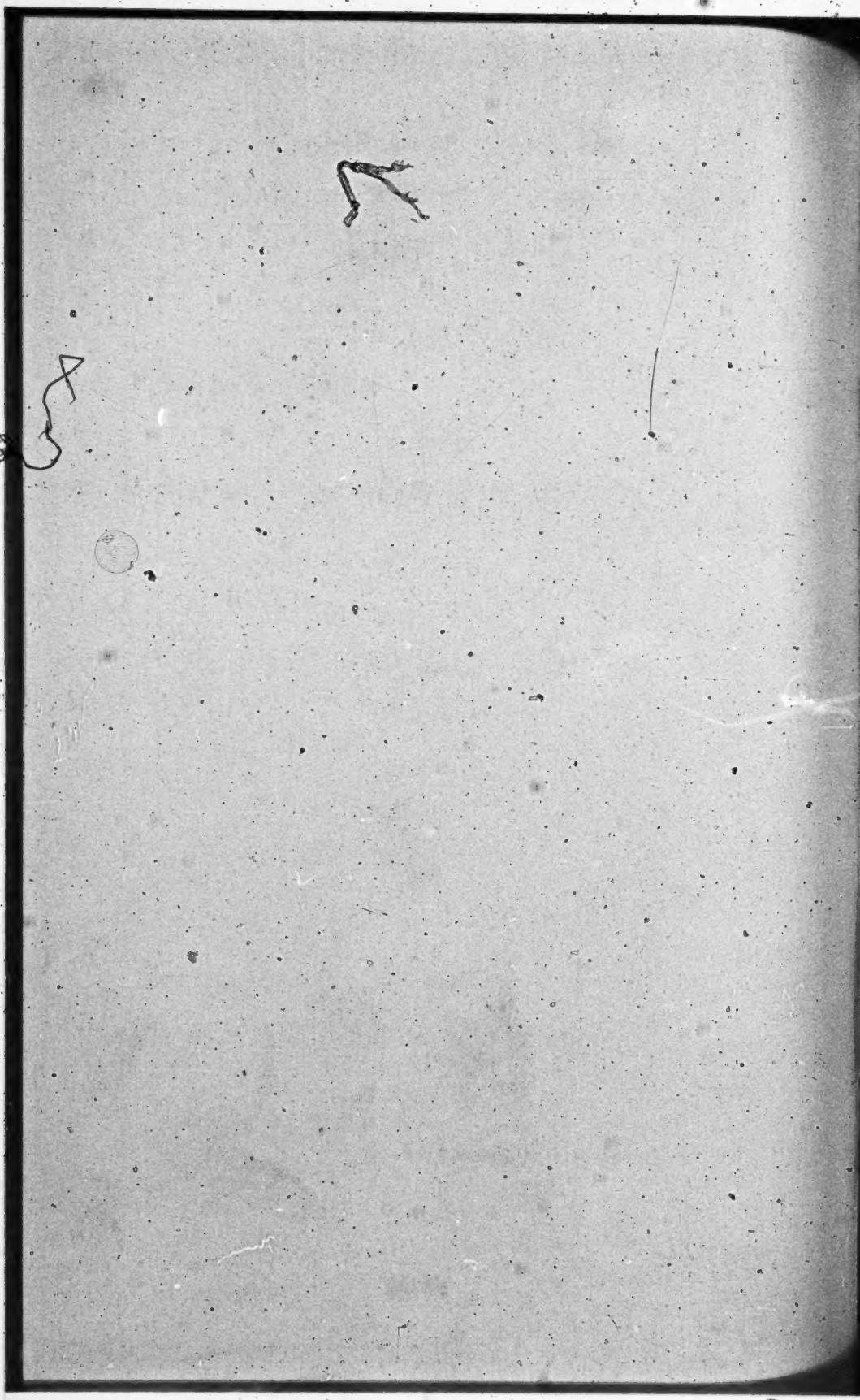
Endorsed on cover: File No. 35,284. U. S. Circuit Court of Appeals, First Circuit. Term No. 362. Gasoline Products Company, Inc., vs. Champlin Refining Company. Petition for writ of certiorari and exhibit thereto. Filed August 19, 1930. File No. 35,284.



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# In the Supreme Court of the United States

OCTOBER TERM, 1930.

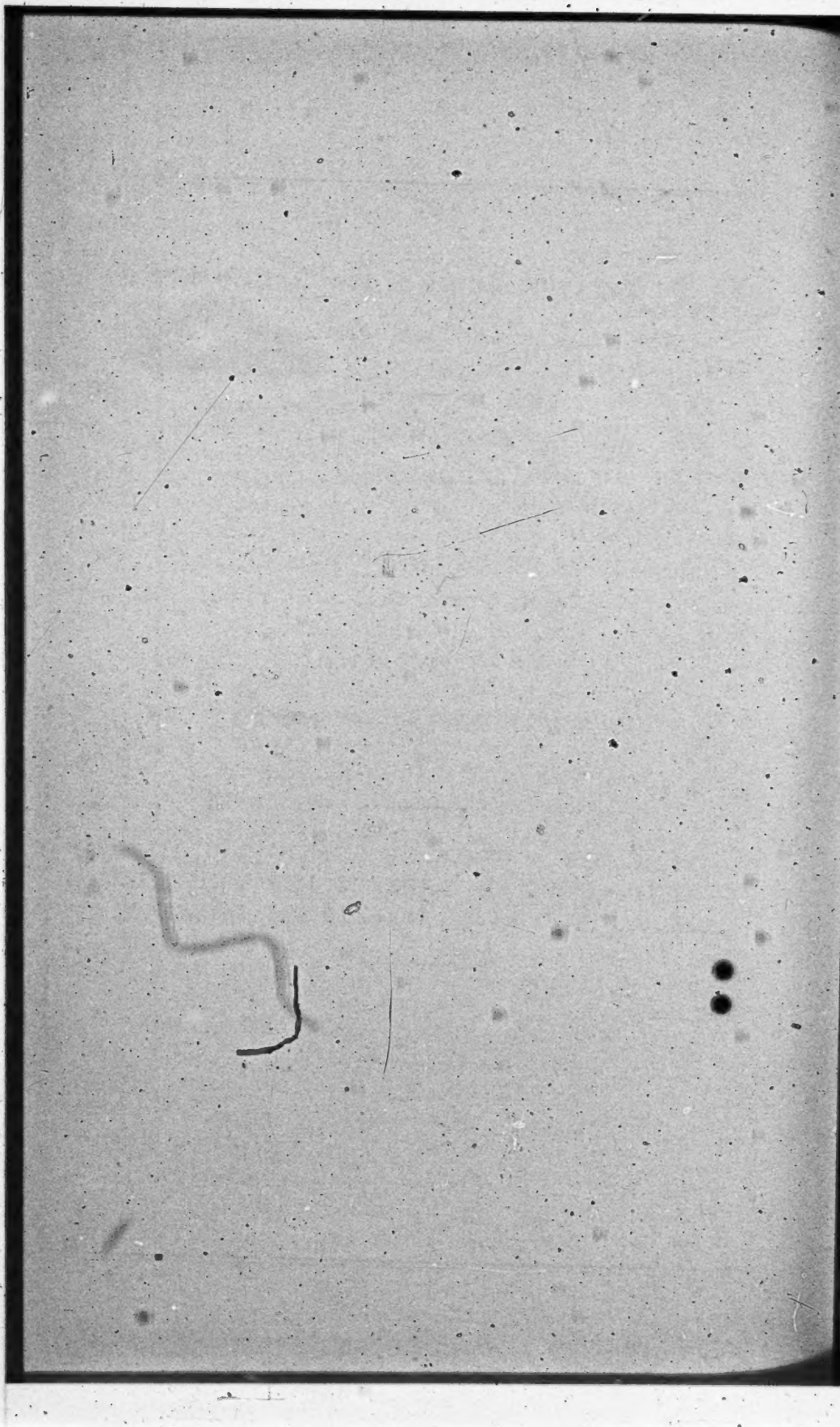
No. 362

GASOLINE PRODUCTS COMPANY, INC.,
PETITIONER,

*v.*

CHAMPLIN REFINING COMPANY.

## PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT AND BRIEF IN SUPPORT THEREOF



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# In the Supreme Court of the United States

OCTOBER TERM, 1930.

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No. ------.

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GASOLINE PRODUCTS COMPANY, INC.,
PETITIONER,

*v.*

CHAMPLIN REFINING COMPANY.

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## PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT AND BRIEF IN SUPPORT THEREOF

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### PETITION

*To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:*

The petitioner, Gasoline Products Company, Inc., the plaintiff below and hereinafter referred to as the plaintiff, respectfully prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the First Circuit entered in the above entitled cause on May 21, 1930.

### STATEMENT OF FACTS

This case involves the correction of rulings of the Circuit Court of Appeals for the First Circuit relating to the

conduct of jury trials in the United States Courts, its interpretation of statutes of the States of Maine and Oklahoma in a manner inconsistent with the applicable State Court decisions, and the application of the rules laid down by the decisions of this Court as to the evidence warranting the submission of a case to the jury and the recovery of loss of anticipated profits upon the breach of a contract.

The controversy relates entirely to a defense set up by the defendant in a plea of "counterclaim in set-off", the defendant not having contested its liability to pay the plaintiff's claim.

The case was commenced in the United States District Court for the District of Maine, Southern Division, on March 18, 1927, as a suit in equity based upon a license contract dated February 26, 1926 (Record pp. 7-20), between the plaintiff and the defendant, under which the plaintiff licensed the defendant to construct and operate at the defendant's oil refinery in Enid, Oklahoma, two Cross cracking units, plaintiff praying for an accounting of the amount of oil treated in said units and for a decree for the royalties at ten cents per barrel payable by the defendant under the license agreement. The defendant, by its answer, admitted the making of the license contract, the construction of the cracking units and the treatment therein of a specified quantity of oil. Its answer also set up a counterclaim alleging the making and breach by the plaintiff of a written contract for the construction of a "Cross vapor phase treating system tower" to treat the gasoline produced by the two Cross cracking units. The plaintiff having moved to strike out the counterclaim, defendant made a motion to

transfer the case to the law side of the Court, which motion was granted.

Plaintiff thereupon substituted for its bill in equity a declaration at law in a plea of covenant broken (Record pp. 4-7) repeating substantially the allegations of the original bill. Defendant filed its plea of general issue, adding thereto what it termed its "counterclaim in set-off" (Record pp. 20-45).

The counterclaim contains two counts. In both, the defendant admits the making of the license contract, the construction of the Cross cracking units and the operation thereof in accordance with the license, and in both, it also alleges the making of two other contracts relating to the Cross cracking units (Exhibits 1 and 2 to plea, Record pp. 31-43), one for the construction thereof by the M. W. Kellogg Company, the other for the guarantee of the physical performance thereof by the plaintiff. In the *first count* (Record pp. 22-26) defendant alleges the existence of a contract for the construction of a Cross vapor phase system treating tower, arising from an *oral* proposal made by Welling, the Vice-President of the plaintiff, in January 1926, accepted by the defendant by the defendant's execution of the three contracts relating to the cracking units (which occurred in March 1926). The *second count* (Record pp. 26-31) is substantially identical with the first except that it alleges the existence of a contract for the construction of a Cross vapor phase system treating tower, arising from a *written* proposal to defendant dated February 6, 1926, signed by Cross Engineering Company (Exhibit 3 to the plea, Record pp. 44, 45) accepted orally by the defendant through its President on February 6, 1926,

and confirmed by the defendant's execution of the three contracts relating to the cracking units.

The elements of damage asserted in both counts of defendant's counterclaim in set-off were losses sustained on storage of gas-oil in anticipation of construction of the cracking plant, losses on accumulation of cracked gasoline produced from the cracking units before completion of substitute treating apparatus to treat the same, loss due to evaporation of gasoline in storage, extra labor, fuel and insurance, loss of interest on money if would have received on the finished product, loss incident to shutting down its plant because of lack of treating apparatus, and loss of anticipated profits upon the sale of the cracked gasoline (due to fall in market value), all to a total of $302,316.55.

The first trial of the case took place at the April term 1928 before a jury. Defendant's liability for royalties having been stipulated, defendant offered testimony on its counterclaim and at the close of such testimony plaintiff made a motion, somewhat analogous to a motion for nonsuit, that the defendant's account in set-off and all the testimony offered thereunder be stricken from the record on the ground that said testimony failed to establish any claim or right of action by the defendant against the plaintiff. The motion was granted over defendant's exception and the defendant appealed from the resulting judgment for the plaintiff to the Circuit Court of Appeals for the First Circuit.

On this appeal the issues were:

(1) Whether there was evidence which should have been submitted to the jury on the question of the

existence of the alleged contract for treating apparatus and the breach thereof by the plaintiff and, if so, as to the alleged damage resulting from such breach; and

(2) Whether under the Maine statute on set-off such an unliquidated claim for damages could properly be asserted by way of set-off.

The Circuit Court of Appeals sustained the defendant's exceptions and reversed the judgment, sending the case back for a new trial (29 Fed. 2nd, 331). The majority opinion held that defendant's claim was properly pleaded in set-off under the Maine statute, but Judge JOHNSON, the only Maine member of the Court, dissented, holding that the requirement of the Maine statute on set-off in regard to damages was not merely technical as suggested by the majority, but that it could not be complied with if the damages alleged were not capable of ascertainment.

The case was again tried to a jury in the April term 1929.

Briefly the facts disclosed by the testimony at this second trial with reference to the counterclaim were as follows: Defendant, which had been operating a refinery in Enid, Oklahoma, decided in 1925 to install a cracking process for the purpose of increasing the proportion of gasoline obtainable from the crude oil treated and thereupon made a thorough investigation of a number of patented cracking processes, including the one licensed by the plaintiff under its patents known as the "Cross Cracking Process". Negotiations with the plaintiff or its representatives commenced in March 1925 and as a result of such negotiations and investigation, defendant definitely selected

the Cross Cracking Process and in late January or early February 1926, approved in general outline the three contracts later executed, that is, the license agreement sued on by the plaintiff, the construction contract providing for the construction of the Cross cracking units by the M. W. Kellogg Company and the guarantee contract in which the plaintiff guaranteed the physical performance of the cracking units. There were numerous conferences in Enid and New York, as well as telephone conversations and correspondence, relating to these three contracts and the same were revised and signed by the defendant in Enid on February 26, 1926, thereafter further revised and re-signed by the plaintiff and by the Kellogg Company in New York and finally re-executed by the defendant in Enid, Oklahoma, on March 20, 1926. The Cross cracking units were constructed in accordance with the contracts, accepted on September 16, 1926, and have been operated continuously since that date, complying in all respects with the contracts.

In December 1925, discussions were started between the defendant and P. C. Keith, Jr., and Harcourt, his predecessor, who were handling the negotiations on the part of the plaintiff and the Kellogg Company, as to what means should be adopted for treating the cracked gasoline produced from the cracking units to make the same merchantable from the points of view of color, odor and freedom from sulphur. Keith and Harcourt first recommended the Gray vapor phase treating process, which was then in successful commercial operation in a number of plants, including several Cross cracking plants like defendant's, examined by the defendant. The defendant was solicited by the owner of the Gray process and was familiar with its operation.

In December 1925 or January 1926, Keith brought to the attention of the defendant an experimental treating process still in the laboratory stage of development, invented by the Doctors Cross, the inventors after whom the Cross Cracking Process was named, and stated that the Cross Development Corporation owning the patents on the Cross vapor phase treating process would be prepared to finance the installation of an initial commercial unit which would be royalty free, the unit to be paid for by the defendant if it proved satisfactory. There was a sharp conflict of testimony as to whether the offer was for one unit or for three, which would be necessary to handle the output of two cracking units. (Record pp. 56-58, 141, 372-377, 591-595.) The defendant's plea alleges a contract for one unit but its testimony pointed to an offer of three.

The offer of Keith was confirmed by Welling, a Vice-President of Cross Development Corporation and also of the plaintiff, at an interview in Enid in the end of January 1926 and was further confirmed by the proposal of February 6th signed by Keith as Vice-President of Cross Engineering Corporation, a separate engineering concern owned by the Doctors Cross in Kansas City.

There was no contention that the offer of Welling on behalf of Cross Development Corporation or the written proposal of Cross Engineering Company was ever accepted in writing and the plaintiff's contention both in the District Court and in the Circuit Court of Appeals was that there was no evidence of the acceptance in any manner of either proposal. The testimony showed that the question of treating in the defendant's plant was discussed repeatedly during the period from December 1925 to October 1926.

Throughout this period the defendant was repeatedly warned that the Cross vapor phase treating process was purely a laboratory affair which had never been used or even tried commercially and Harvison of the Kellogg Company and others strongly advised the defendant to adopt the Gray treating process or some other process which had been used commercially and found satisfactory (Record pp. 372, 374, 594, 601, 602.) In May 1926, no plans had as yet been prepared for treating apparatus and the defendant sent representatives to New York to go into the matter. There they were advised by counsel that the Cross vapor phase treating process would probably infringe the Gray patents. The defendant's representatives interviewed Gray, who repeated the warning, and told Gray that they were then considering installing either the Gray treating process or the ordinary unpatented treating process then in general use, of acid treating and re-running. In June Keith ascertained from the Doctors Cross, and informed the defendant, that the Cross vapor phase treating process would be unduly expensive to operate and suggested the adoption either of the Gray process or of the Cross liquid phase treating process then in successful operation at several refineries (Record pp. 283-285, 443-444, 622-623).

In July 1926, a sharp controversy arose between the defendant on the one side and Keith, the plaintiff and the M. W. Kellogg Company on the other side, as to what should be done to provide treating apparatus to handle the output of the Cross cracking units then nearing completion. The defendant demanded the installation of three Cross vapor phase treating towers, though the original proposal of February 6th was for only one such tower (Rec-

ord pp. 44-45); and defendant also demanded that the plaintiff should guarantee that the cost of operation should not exceed that of the Gray process though the plaintiff had never made any undertakings as to such operating cost. The plaintiff offered to proceed with the proposal of February 6, 1926 if defendant would accept the same but this the defendant refused to do.

Upon at least four occasions, July 17th, July 27th, August 13th and September 18th, 1926, Keith offered the defendant the alternative of accepting the written proposal of February 6th amplified to include three towers instead of one or of adopting one of two alternative propositions, either installing the Gray treating process with substantial financial assistance from the Kellogg Company on the matter of royalties and construction cost, or installing treating towers on plans to be approved by defendant, but without patent protection. The defendant on each occasion refused all three propositions and insisted on the Cross vapor phase treating process plus a guarantee as to the operating expense thereof (Record pp. 115, 127, 128, 626-635). On August 13, 1926 defendant advised plaintiff that it would build its own treating process and undertook so to do (Defendant's Exhibit 23, Record p. 97). The defendant then spent some time in endeavoring to develop a type of treating tower that would not infringe the Gray patents and finally in October or November it prepared plans upon the basis of an old German patent and the three towers were completed in February 1927, four months and a half after completion of the cracking units.

During this period from September 1926 to February 1927, the defendant operated the cracking units and stored

the cracked gasoline although the market for gasoline was steadily declining. It also stored an equal amount of straight-run gasoline manufactured in its skimming plant and the principal loss of profits claimed by the defendant was the sum of $179,459.14 asserted to represent the difference between the market value of the cracked gasoline between the dates of manufacture and the date when the same was actually treated and sold after the completion of defendant's treating apparatus (Defendant's Exhibit 61). Damages were also claimed for the alleged excess cost of the treating apparatus constructed by the defendant over the estimated cost of the Cross vapor phase treating towers (Record p. 255) and for loss of interest (Defendant's Exhibit 62) and other items due to the delay in completion of the treating towers.

The plaintiff introduced testimony showing that there were five alternative methods for treating the cracked gasoline produced in the cracking units during the four months' period which could have been installed and used with substantially no loss to the defendant and could have been completed within from ten days' to six weeks' time, so that the losses claimed by the defendant need not have been incurred had the defendant used reasonable diligence to prevent the same (Record pp. 474-477). There was a conflict of expert testimony as to the availability and cost of some of these methods of avoiding the loss (Testimony of Dr. Cross for plaintiff, Record pp. 458-551 and of Mr. Koch for defendant, Record pp. 664-689).

The principal issue of the case was whether the undisputed testimony tended to prove the existence of any contract whatever entered into between the plaintiff and the

defendant for the erection of treating apparatus. If a contract was entered into, there was a further controversy as to its terms, notably as to whether it related to one treating tower or three, the date of its making and the date of its breach, if any. The question as to what damages, if any, were recoverable by the defendant obviously depended upon the terms of the alleged contract, particularly with respect to the number of towers involved, the date when said contract was made and the date when it was breached. The date of making the contract was relevant in interpreting its terms particularly with regard to prospective profits, and the date of breach was particularly important in its bearing on the duty and ability of the defendant to minimize the damages alleged.

The issues as to liability and damage were inseparable. As to loss of profits, the most important element of damage, the contemplation of the parties at the time of entering into the alleged contract, was all important under the familiar rule in *Hadley* v. *Baxendale*, 9 Exch. 341.

At the close of all the testimony plaintiff moved for a directed verdict in its favor for the amount sued for on the ground that said indebtedness had been confessed and that no offsetting indebtedness had been shown. The Court denied the motion and left the case to the jury, which returned the following verdict (Record pp. 808-809):

> "The jury find that the amount due the Plaintiff on its writ is Sixty-one Thousand Five Hundred Thirty Dollars and Fifty-six Cents ($61,530.56);
>
> "And that the amount due the Defendant on its account in set-off is Forty Thousand Nine Hundred Eighty Dollars and Fifty-nine Cents ($40,980.59);

"Leaving a balance due the Plaintiff in the sum of Twenty Thousand Five Hundred Forty-nine Dollars and Ninety-seven Cents ($20,549.97)."

On this verdict judgment was entered for the balance, amounting together with interest and costs to a total of $23,032.85 (Record p. 825). Both parties appealed. This was the only verdict rendered by the jury and though it implies a belief on the part of the jury in the existence of some contract for treating apparatus it does not appear therefrom and there is no way of telling whether this verdict was rendered on the first count of the writ or on the second count or what the jury believed to be the terms of said contract, the date of its making or the date of its breach.

On this second appeal the only questions raised by the exceptions of either party again related to the defendant's counterclaim.

The principal issues raised by the plaintiff's exceptions were:

(1) Whether on all the evidence, which was much more ample than the evidence at the first trial, the Court should have left to the jury the question as to the existence of the contract and its breach by the plaintiff.

(2) Whether on all the evidence the Court should have left to the jury the question as to whether any loss was sustained by the defendant as a result of the alleged breach of such contract.

The principal issues raised by the defendant's exceptions were as to whether the Court's charge on the question of

damages from loss of profits and the allowance of interest upon such damages was correct as a matter of law.

At the second trial the plaintiff again excepted to the admission of any testimony upon defendant's counterclaim in set-off on the ground that the same was improper under the Maine statute (Rev. Stat. of Maine (1916), chapter 87, section 75), which allows to be set off only

> "a demand * * *, founded on a * * * contract express or implied, * * * for a liquidated sum, or for one ascertainable by calculation."

This exception (Record p. 47) was not pressed a second time before the Circuit Court of Appeals on account of the decision of that Court on the first appeal.

On April 7, 1930, the Circuit Court of Appeals handed down a second decision (reported in 39 Fed. 2nd, 521) overruling all of the exceptions of the plaintiff and sustaining the exceptions of the defendant on three points only, first, the inclusion in the charge of a ruling that loss of profits must not be "in any degree uncertain, speculative, contingent or conjectural", and second, the failure to direct the allowance of interest on the excess cost of the substitute treating towers, and third, the failure to allow the jury in its discretion to allow interest on loss of profits. The decision vacated the judgment in respect of damages only and directed the case to stand for a new trial *on defendant's damages only*. Judge WILSON, recently Chief Justice of the Supreme Court of Maine, concurred "in the reasons for sending this case back for further hearing on the question of the defendant's damages", but expressed himself as not caring to be understood "as thereby approving the

view that the defendant's claim is a proper account in set-off under section 75 of chapter 87 of the Maine statutes".

The plaintiff petitioned for re-hearing (Record pp. 851-852) on the ground that the mandate of the Circuit Court of Appeals sending the case back for retrial on damages only, in effect breached the plaintiff's right to a jury trial on the issues of the case, also on the further grounds that the Circuit Court of Appeals had erred in applying the Oklahoma rule on the allowance of interest on unliquidated damages and had mistakenly ordered a new trial on account of merely trivial errors in the charge of the learned District Judge. The petition for re-hearing was denied without opinion, the Court modifying the mandate slightly in point of form but not in substance. This decision was handed down on May 21, 1930.

Your petitioner believes that the aforesaid judgment of the Circuit Court of Appeals is erroneous and that this Honorable Court should require the said case to be certified to it for its review in conformity with the provisions of the act of Congress in such case made and provided.

Your petitioner presents herewith, as part of this petition, a transcript of the record in the Circuit Court of Appeals, together with a record of the proceedings in said Court.

## SPECIFICATION OF ERRORS

Your petitioner insists that the Circuit Court of Appeals erred—

1. In depriving the plaintiff of its constitutional right to jury trial by remanding the case to the District Court for re-trial on the question of defendant's damages only.

2. In allowing the defendant to assert in an account in set-off under the Statutes of Maine its demand for unliquidated damages for the breach of this contract.

3. In deciding that under the statutes of Oklahoma and the decisions of Oklahoma courts the jury might in its discretion assess interest upon unliquidated damages.

4. In deciding that there was evidence to go to the jury of the existence of a contract.

5. In deciding that "the defendant did, on the weight of evidence, make out a claim for a substantial sum of lost profits as damages".

## REASONS FOR GRANTING THE WRIT

The reasons why the writ should issue are:

1. The effect of the mandate of the Circuit Court of Appeals is to preclude from the consideration of any jury the existence and nature of the contract alleged to have been breached and thus to deny to the petitioner its constitutional right to jury trial as determined in *Slocum* v. *New York Life Insurance Company*, 228 U. S. 364, 57 L. Ed. 879, and many other cases.

2. The decision of the Circuit Court of Appeals in granting a new trial on damages only is squarely in conflict with the decision of the Circuit Court of Appeals for the Third Circuit in *McKeon* v. *Central Stamping Co.*, 264 Fed. 385, which holds such a partial retrial to deny the constitutional right of jury trial. This conflict between the first

and third circuits should be resolved by a decision of this Court. (Rule 38 (5) (b), United States Supreme Court.)

3. The Circuit Court of Appeals for the First Circuit has construed the Maine statute as to set-off of demands, which is an important question of Maine law, in a manner squarely in conflict with the decisions of the Supreme Judicial Court of Maine. The Judges of said Circuit Court of Appeals familiar with the Maine statute and the decisions thereunder have so recognized.

4. The Circuit Court of Appeals in applying the Oklahoma law as to interest on unliquidated damages has overlooked the Oklahoma statute and cited an Oklahoma case in support of its opinion when its holding is the reverse.

5. The decision of the Circuit Court of Appeals upon the important question of general law as to whether or not the evidence in the case warranted its submission to the jury is untenable and in conflict with the great weight of authority.

6. The decision of the Circuit Court of Appeals upon the important question of general law as to the evidence necessary to establish a claim for loss of profits upon breach of a contract is untenable and in conflict with the weight of authority.

## PRAYER

WHEREFORE your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court directed to the Circuit Court of Appeals for the First Circuit commanding said Court to certify and send to this Court on a day certain to be therein designated a

full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in this case which was entitled in that Court: Gasoline Products Company, Inc., plaintiff-appellant, *vs.* Champlin Refining Company, defendant-appellee, #2415, and Champlin Refining Company, defendant-appellant, *vs.* Gasoline Products Company, Inc., plaintiff-appellee, #2416, to the end that said cause may be reviewed and determined by this Court as provided by section 240 of the Judicial Code, and that your petitioner may have such other and further relief or remedy in the premises as to this Court may seem appropriate and that the said judgments of said Circuit Court of Appeals in the said case and every part thereof may be reversed by this Honorable Court and your petitioner will ever pray.

GASOLINE PRODUCTS COMPANY, INC.,

By JOHN B. MARSH,
ROBERT HALE,
*Counsel for Petitioner.*

August, 1930.

STATE OF NEW YORK,
County of New York, } ss.:

JOHN B. MARSH, being duly sworn, says that he is counsel for Gasoline Products Company, Inc., the petitioner, that he prepared the foregoing petition and that the allegations thereof are true as he verily believes.

JOHN B. MARSH

Sworn to and subscribed before me,
this 16th day of August, A. D. 1930.

*Notary Public.*

## BRIEF IN SUPPORT OF THE PETITION

### OPINIONS OF THE COURT BELOW

Opinions of the Circuit Court of Appeals for the First Circuit are found respectively in 29 Federal 2nd, 331, and 39 Federal 2nd, 521 (Record pp. 844a-851). The Court rendered no opinion on the plaintiff's petition for re-hearing.

### JURISDICTION

The judgment of the Circuit Court of Appeals for the First Circuit was rendered on May 21, 1930 (Record p. 853).

The jurisdiction of this Court is invoked under section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 now appearing as section 347 (a) of Title 28 of the United States Code annotated.

### STATEMENT

A statement of the facts and of the errors assigned will be found in the petition for certiorari.

### SUMMARY OF THE ARGUMENT

#### I.

THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT IN REMANDING THE CASE TO THE DISTRICT COURT FOR RETRIAL "ON DEFENDANT'S DAMAGES ONLY" HAS ABRIDGED THE PLAINTIFF'S CONSTITUTIONAL RIGHT TO JURY TRIAL.

#### II.

THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT HAS ERRED IN APPLYING THE MAINE LAW OF SET-OFF.

III.

THE CIRCUIT COURT OF APPEALS IN APPLYING THE OKLAHOMA LAW AS TO INTEREST ON UNLIQUIDATED DAMAGES HAS OVERLOOKED THE OKLAHOMA STATUTE AND CITED AN OKLAHOMA CASE IN SUPPORT OF ITS OPINION WHEN ITS HOLDING IS THE REVERSE.

IV.

THE DECISION OF THE CIRCUIT COURT OF APPEALS AS TO WHETHER THE EVIDENCE IN THE CASE WARRANTED ITS SUBMISSION TO THE JURY IS UNTENABLE AND IN CONFLICT WITH THE GREAT WEIGHT OF AUTHORITY.

V.

THE CIRCUIT COURT OF APPEALS ERRED IN HOLDING "THAT THE DEFENDANT DID, ON THE WEIGHT OF EVIDENCE, MAKE OUT A CLAIM FOR A SUBSTANTIAL SUM OF LOST PROFITS AS DAMAGES".

ARGUMENT

I

THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT IN REMANDING THE CASE TO THE DISTRICT COURT FOR RETRIAL "ON DEFENDANT'S DAMAGES ONLY" HAS ABRIDGED THE PLAINTIFF'S CONSTITUTIONAL RIGHT TO JURY TRIAL.

The seventh amendment to the Federal Constitution reads as follows:

> "In suits at common law where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and *no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law.*" (Italics ours.)

It has repeatedly been held that the rules referred to in this amendment are the rules of common law as understood in England at the time when the Federal Constitution and the seventh amendment were adopted. See *Capital Traction Company* v. *Hof*, 174 U. S. 1, 43 L. Ed. 873, *Slocum* v. *New York Life Insurance Company*, 228 U. S. 364, 57 L. Ed. 879, *Liberty Oil Company* v. *Condon National Bank*, 260 U. S. 235, 67 L. Ed. 232.

**IT IS THE GENERAL RULE THAT UPON THE REVERSAL OF A JUDGMENT A NEW TRIAL UPON THE WHOLE CASE SHOULD BE ORDERED.**

In *Slocum* v. *New York Life Insurance Company, supra*, a Circuit Court jury had given a verdict for the plaintiff after the Court had denied a motion for directed verdict. The Circuit Court of Appeals held erroneous the denial of the motion for directed verdict and entered judgment for the defendant under a state statute authorizing this procedure. This Court held it error on the part of the Circuit Court of Appeals to direct the judgment for defendant instead of ordering a new trial.

Mr. Justice VAN DEVANTER, after discussing the opinions in *United States* v. *Wonson*, 1 Gall. 5, Federal Cases #16750; *Parsons* v. *Bedford*, 3 Peters 433, 7 L. Ed. 732; *Walker* v. *New Mexico & Southern Pacific Railroad Company*, 165 U. S. 593, 41 L. Ed. 837; and *Capital Traction Company* v. *Hof*, 174 U. S. 1, 43 L. Ed. 873, said:

> "These decisions make it plain, first, that the action of the Circuit Court of Appeals in setting aside the verdict and assuming to pass upon the issues of fact, and to direct a judgment accordingly, must be tested by the

rules of the common law; second, that while under those rules that court could set aside the verdict for error of law in the proceedings in the Circuit Court, and order a new trial, it could not itself determine the facts; and, third, that when the verdict was set aside there arose the same right of trial by jury as in the first instance. How, then, can it be said that there was not an infraction of the 7th Amendment? When the verdict was set aside the issues of fact were left undetermined, and until they should be determined anew no judgment on the merits could be given. The new determination, according to the rules of the common law, could be had only through a new trial, with the same right to a jury as before. Disregarding those rules, the Circuit Court of Appeals itself determined the facts without a new trial. Thus, it assumed a power it did not possess, and cut off the plaintiff's right to have the facts settled by the verdict of a jury.

* * *

"In the trial by jury, the right to which is secured by the 7th Amendment, both the court and the jury are essential factors. To the former is committed a power of direction and superintendence, and to the latter the ultimate determination of the issues of fact. Only through the co-operation of the two, each acting within its appropriate sphere, can the constitutional right be satisfied. And so, to dispense with either, or to permit one to disregard the province of the other, is to impinge on that right.

* * *

"In principle, these cases are decisive of the question arising on the motion for judgment on the evidence notwithstanding the verdict. They show that it is the province of the jury to hear the evidence and by their verdict to settle the issues of fact, no matter what the

state of the evidence; and that while it is the province of the court to aid the jury in the right discharge of their duty, even to the extent of directing their verdict where the insufficiency or conclusive character of the evidence warrants such a direction, the court cannot dispense with a verdict, or disregard one when given, and itself pass on the issues of fact. In other words, the constitutional guaranty operates to require that the issues be settled by the verdict of a jury, unless the right thereto be waived. It is not a question of whether the facts are difficult or easy of ascertainment, but of the tribunal charged with their ascertainment; and this, we have seen, consists of the court and jury, unless there be a waiver of the latter."

The Circuit Court of Appeals for the Third Circuit has held in *McKeon* v. *Central Stamping Company*, 264 Fed. 385, that a practice act of the State of New Jersey authorizing a new trial in respect to damages only is not applicable in the Federal courts, by reason of the seventh amendment. The action in this case was in tort for personal injury suffered by the minor plaintiff through the alleged negligence of the defendant's employees. The plaintiff recovered a verdict unsatisfactory to him in amount and the trial judge under the New Jersey statute in question granted a right to retrial restricted to the sole issue of the amount of damages sustained by the infant plaintiff. At this new trial the defendant offered to prove its entire defense, but the proof was excluded and verdict on the restricted issue was rendered. Judgment was entered thereon and defendant prosecuted his writ of error. Judge BUFFINGTON, in reversing the judgment and ordering a completely new trial, uses the following language:

"The question thus raised" (on the seventh amendment) "is basic in character. Such divided verdict, namely, one where 24 men have, in two separate juries of 12 each, passed on parts of the issues on which the judgment rests, and where neither the 24 collectively and neither of the 12 singly have passed on all the issues which support the judgment, constitutes such a departure from the unvarying trial course followed in our federal courts that, in the absence of any opinion on the record by the trial judge warranting such a course, it becomes the imperative duty of this tribunal to justify, or by judicial opinion and judicial decree forbid, a departure from the course of trial that has obtained in historic continuity in the courts of the United States from the foundation of the government.

* * *

"What do these few simple words, used in the Constitution, 'the right of trial by jury shall be preserved,' mean? Manifestly, in answering that question, we naturally ask: What did these words mean to those who used them when they were written into the Constitution? Now, in construing those words, one basic fact challenges our attention, namely, that there was something that was then preserved, for preservation implies the continuance of what previously existed. Preservation is not creation; it is the saving that which already exists. Seeing, then, we have here a word which implies the existence of something already in being, we find the call of the words 'preserved,' 'shall be preserved,' answered by a definite thing, to wit, 'the right of trial by jury.' And it will be noted that we are not dealing with an indefinite, but a very definite, concrete, well-understood thing, that at that time had such a recognized meaning that it was described, not

as 'a right of trial by jury,' not as some or any right of trial by jury, but as 'the right of trial by jury.'

* * *

"Addressing ourselves, then, to the question of what was this trial by jury as then fixed by the common law of Great Britain, it will be seen that the jury of the common law of England consisted of 12 men, that it heard all the evidence pertinent to the issue raised by the pleadings, it returned a single verdict, and upon such verdict judgment was entered, and if a new trial is granted it is a trial of the whole case.

* * *

"Seeing, then, that text-book writers on the common law of England and the Year Books and Reports of that country show no instance where trial by jury at common law has been other than a trial by one jury of all the issues involved in the case, and that the federal courts have preserved this common-law practice of jury trial in unbroken historic continuity in fulfillment of the constitutional guaranty, both in criminal and civil cases, we are justified in holding, also, that the action of the court below in following the New Jersey statute was not warranted by the federal conformity statute cited, and this for the reason that new trials, under the federal decisions, are not governed by the conformity statute."

We submit that the foregoing case is correctly decided and that it governs the plaintiff's right in the case at bar.

It is true that there are federal decisions inconsistent with *McKeon* v. *Central Stamping Company*, three of them having been decided by the Circuit Court of Appeals for the First Circuit: *Farrar* v. *Wheeler*, 145 Fed. 482; *Calaf*

v. *Fernandez*, 239 Fed. 795; *F. E. Atteaux & Co.* v. *Pancreon Mfg. Co.*, 22 Fed. 2nd, 749.

On motion for rehearing in *Farrar* v. *Wheeler*, 145 Fed. at p. 486, Judge PUTNAM said:

> "This is an action of tort for personal injuries, in which the judgment below was in favor of the plaintiff on a verdict of a jury. The suit was brought by a minor for an injury to himself, and, in assessing damages, the jury were permitted to allow him for loss of time, services, and earning capacity during his minority, in addition to what might be assessed for his physical sufferings. The only error was in allowing damages for loss of time, services, and earning capacity during his minority. In all other respects the proceedings at the trial were found to be correct. We held that the case should go back for a new trial on the issue of damages alone, and judgment was entered accordingly. *The plaintiff in error, who was the defendant below, has now filed a petition for rehearing, in which he claims that, although the error related only to the rule of damages, the entire verdict must, or should in justice, be set aside, and that a venire de novo must, or should in justice, be ordered covering all the questions submitted to the jury. This is undoubtedly the rule at common law.* Of course, in criminal proceedings at common law the rule is even more rigid. This, however, is all changed, so far as we are concerned, by various acts of Congress, of which the last was that of June 1, 1872, c. 255, sec. 2, 17 Stat. 196. This is now found in section 701 of the Revised Statutes, as follows:
>
> " 'The Supreme Court may affirm, modify, or reverse any judgment, decree or order of a Circuit Court, or District Court acting as a Circuit Court, or of a

> District Court in prize causes, lawfully brought before it for review, or may direct such judgment, decree or order to be rendered, or such further proceedings to be had by the inferior court, as the justice of the case may require.' " (Italics ours.)

Practically all the cases which have ordered a re-trial on damages only or on any restricted issue cite this case of *Farrar* v. *Wheeler*, which was decided in 1906.

On this account we wish to emphasize the following points in connection with the case; first, Judge PUTNAM frankly admits that he is transgressing the common law rule; second, he justifies this transgression and the consequent ignoring of the seventh amendment to the Federal Constitution by the language of section 701 of the Revised Statutes, which is not applicable to a Circuit Court of Appeals and which does not specifically empower any appellate court to order new trials upon limited issues only and could not derogate from the seventh amendment to the constitution if it did; and third, the issue to which the new trial was there limited was far more nearly severable than the issue to which new trial is limited in the case at bar.

In so far as section 701 of the Revised Statutes has any bearing on the case at bar, it is reproduced in section 877 of Title 28 of the United States Code Annotated reading in its relevant portion as follows:

> "Whenever on appeal or writ of error or otherwise a case coming from a district court shall be reviewed and determined in the Circuit Court of Appeals in a case in which the decision in the Circuit Court of Appeals is final, such cause shall be remanded to the said

District Court for further proceedings to be there taken in pursuance of such determination."

However, the general language of this section affords no more authorization than its predecessor for limited retrials in Federal tribunals. The history of section 701 of the Revised Statutes is very fully discussed by former Chief Justice WHITE in *Ballew* v. *United States*, 160 U. S. 187, 40 L. Ed. 388, but we believe that some of the language employed by the learned Justice must be reconsidered in the light of this Court's subsequent opinion in *Slocum* v. *New York Life Insurance Company, supra*.

The principal Federal cases outside the First Circuit granting new trials limited to a single issue only are:

*Twenty-one Mining Co.* v. *Original Sixteen to One Mine*, 254 Fed. 630;

*Thorpe* v. *National City Bank of Tampa*, 274 Fed. 200;

*Chicago, Rock Island & Pacific Railroad Co.* v. *Stephens*, 218 Fed. 535;

*Fentress Co.* v. *Elmore*, 240 Fed. 328.

In *Empire Fuel Co.* v. *Lyons*, 257 Fed. 890, and *Kean* v. *National City Bank*, 294 Fed. 214, Circuit Courts of Appeal refused to grant new trials upon restricted issues.

### ENGLISH CASES PRIOR TO 1789.

In an examination of the practice at common law prior to 1789, we have discovered no precedent for an appellate court granting anything other than a complete new trial as to all the issues in a civil case. The English courts of the period clearly recognized their inability to do otherwise.

As early as 1668 we note in *Rolle's Abridgement*, page

722, under the title "Triall", the following report which we reproduce from the Old French:

> "If, in an action of trespass for assault and battery and taking of plaintiff's grain, the defendant justifies as to the battery that it was in defence of his grain, as to which the plaintiff demurs, and as to the grain, the defendant pleads not guilty, in which issue is joined, and which issue the jury finds for the plaintiff, and the jury does not assess damages for the battery, which depends on demurrer, as they should; in this case it seems that if the demurrer should be adjudged for the plaintiff, still the damages for this cannot be supplied and assessed by a writ of enquiry, but a *venire facias de novo* ought to issue to try all because all are included in the original proceeding." (Vashman *v.* Rowe.)

Later on we find *Fern's Case*, H. 27 and 28 Car. II; *Captain Crabb's Case*, M. 23, Geo. S. P.; *Collier* v. *Morris*, M. 1735, Bull. N. P. 326, and *Rex* v. *Poole*, E. 1734, all of which cases are cited and discussed in *Lisbon* v. *Lyman*, 49 N. H. 553.

*Captain Crabb's Case* and *Collier* v. *Morris* held that where there were several defendants and the verdict as to some was against the evidence, the Court would not grant a new trial as to those defendants because it was said that the verdict must stand or fall *in toto*.

So in the case of *Rex* v. *Poole* where there was one issue out of four as against the evidence, the Court granted a new trial on all the issues holding that a new trial could not be granted on the one issue alone.

*Fern's Case* was a criminal information exhibited against three defendants and a verdict was rendered

against all three. A new trial was granted to Fern for want of sufficient notice, and judgment confirmed against the other two. This is sometimes cited as an authority contrary to the foregoing, but this is doubtful, as it may well be that the separate retrial of Fern was by consent of the two defendants as to whom notice was sufficient. In any event the rule was certainly as laid down in *Captain Crabb's Case* and this Judge PUTNAM recognized in *Farrar v. Wheeler.*

Continuing chronologically, we have *Bond v. Spark, et al.,* 12 Modern 275 (1700), which we reproduce in full as follows:

> "Assault and battery; Issue joined on *son assault demesne;* two were acquitted, and Spark found guilty; and it was certified by the judge to be against evidence; and motion for a new trial.
>
> "But the Court said, a new trial could not be granted except against all. Whereupon the attorney for the defendants consented for the two defendants who were acquitted, that they should undergo a new trial, and quit the costs which they might have from the plaintiff on their acquittal; and Spark consented to pay the plaintiff's costs.
>
> "And so a new trial was granted against all."

*Sir Charles Berrington's Case,* 3 Salkeld 362 (1707), which we reproduce in full as follows:

> "In trespass and false imprisonment against several defendants, the plaintiff had a verdict; and afterwards it was moved for a new trial, because as to one of the defendants the verdict was against evidence. *Sed per curiam,* this cannot be done for the court cannot set aside the verdict as to some, and not as to others,

and to grant a new trial as to all would be a prejudice to those who are duly acquitted." Citing Littleton's Reports 164.

In *Parker* v. *Godin*, 2 Strange 813 (1729), we find a note stating:

> "A difficulty arose upon the motion for a new trial, which was this. There were other things besides plate in the declaration, and as to them the verdict pro def. was right; and yet a new trial must be granted upon the whole. But on consideration the court held that could be no reason to refuse a new trial, for if the merits as to those other things were with the defendant, it would be found for him as to them. But it was agreed on all hands, that if one defendant be acquitted, and another found guilty, that defendant can have no new trial."

In *Edie et al.* v. *The East India Company*, reported in 1 W. Bl. 295, and also in 2 Burrows 1216 (1746), the action was on two bills of exchange and verdict was rendered for the plaintiff on one bill and for the defendant on the other. There was a motion for a new trial on the verdict which was for the defendant, as there was an error of law. It was admitted that the verdict for the plaintiff on the other count was correct. Nevertheless a new trial was granted *in toto*. Lord MANSFIELD is reported as saying in the former report:

> "For form's sake, we must set aside the whole verdict."

In the later report (p. 1224), he is quoted as saying:

> "As to the costs, I think there should be none in this case. For the verdict must be set aside *generally*, not in part only."

In *Kay* v. *Panchiman*, 2 Blackstone 1029 (1775), the Court holds, following *Weller* v. *Coish*, decided in 1757, but apparently not reported, that one of two defendants cannot move for a new trial.

In *Swain* v. *Hall*, 3 Wilson 45 (1770), there is a reporter's note as follows:

> "Some days after the Court refused a new trial in this case, the Chief Justice said that it could not have been sent to be tried again upon one of the issues, but it must have gone back on the whole record, viz., upon both the issues; and that one issue being clearly with the defendant, there was no foundation or pretense for a new trial on that issue, and he cited the case of Rowland *v.* Vanhalken, C. B. Easter Term, 1 Geo. 1, from J. Tracey's notes, where it was so determined."

*Bacon's Abridgement, Edition of 1778*, under the title "Trial (L)", says:

> "If two persons are defendants in an action, and there be a verdict in favor of one of them, the Court will not grant a new trial at the instance of the other; because the verdict must, if set aside, be set aside as to both; and it would be very unreasonable that he in whose favor the verdict is should be a second time in jeopardy. But if the defendant, in whose favor the verdict is, consent to the granting of a new trial, the Court will, provided it be in other respects proper, grant a new trial."

The authorities cited in support of this proposition are *Bond* v. *Spark, supra*, and *Parker* v. *Godin, supra*.

In an edition of *Bacon's Abridgement*, published in Philadelphia in 1813, the above statement of the law is re-

peated with an additional note, citing *Boswell* v. *Jones*, 1 Washington (Va.) 332, *Collier* v. *Morris, supra,* and *Captain Crabb's Case, supra,* and *Fern's Case* as *contra.*

In *Leroux's Case,* cited in this edition, the new trial as to one defendant seems to have gone by consent.

In *Chitty's Edition of Blackstone of 1832,* Volume 2, page 299, a note states that "a new trial cannot be granted in civil actions at the instance of one of several defendants", citing *Bond* v. *Spark, supra,* and *Parker* v. *Godin, supra,* "nor for a part only of the cause of action", citing *Swain* v. *Hall, supra,* and *Edie* v. *The East India Company, supra.*

There are cases decided since 1789 which recognize the rule existing prior thereto.

In *Rex* v. *Mawbey, et als.*, 6 Term Reports 619 (1795), four defendants were tried for a misdemeanor and two were acquitted and two were convicted. The two convicted moved for a new trial and it was objected that a new trial could be granted only as to all defendants which would put those acquitted into double jeopardy contrary to law. The Court expressed the opinion that a new trial could be granted as to those convicted, if necessary, for the purpose of doing substantial justice, but it recognized that this rule was applicable to criminal and not to civil trials, for LAWRENCE, *J.*, says in his opinion:

> "Arguments drawn from civil cases are not applicable to the present; because in those there is only one venire on the record and one assessment of damages; but that is not so in a criminal case."

Chief Justice KENYON appears to assume that the rule is confined to criminal cases, and even counsel for con-

victed defendants (Lord ERSKINE and other notable lawyers of the day) admit the impossibility of a partial retrial in a civil case, saying in the course of their argument:

> "The case of Collier *v.* Morris, which is stated as contravening the former" (Fern's Case, a criminal case), "does not seem to apply; for that was a civil action; and there a plaintiff may have a strict legal interest to maintain the verdict, but that cannot be the case with the Crown, which can only be interested in obtaining substantial justice. And the same observation will apply to the cases in 12 Mod. 275 (Bond *v.* Spark), and 3 Salk. 362 (Berrington's Case), which were both civil actions, the one for assault and battery and the other for false imprisonment."

The case of *Rex* v. *Mawbey, supra,* decided in 1795, is the earliest case squarely recognizing the court's right to grant a partial new trial in a criminal case. The same course seems to have been taken earlier in Fern's Case, but the early case contains no discussion of the right and apparently the point was not raised.

In *Mahoney* v. *Frasi,* 3 Tyrwhitt 264 (1833), a jury had given plaintiff a verdict in an action of trespass. The Court set aside the verdict as excessive and defendant moved to restrict the trial to that issue. The Court said:

> "As the plaintiff has a right to a new trial in respect to circumstances which occurred at the first trial, the inquiry cannot be limited or confined, though had it been only a matter of indulgence it might."

In 1830, we see the Massachusetts court in *Sawyer* v. *Merrill*, 10 Pick. 16, applying the rigorous common law rule that where two defendants in trespass are tried together and one acquitted and the other convicted, a new trial cannot be granted as to the latter, for the verdict cannot be set aside as to the one without being set aside as to the other also.

In *Bicknell* v. *Dorion*, 16 Pick. (1835), Chief Justice SHAW discusses the early English cases and expresses the opinion (p. 483) that the ground of the rule in civil cases is that when a verdict is set aside, a *venire facias de novo* is awarded and no notice is taken of the first *venire* and the proceedings under it and there would be nothing on the record to support the verdict in favor of those who have obtained one. Chief Justice SHAW overrules Sawyer *v.* Merrill, and grants a new trial in this case, saying (p. 483) that, however the rule may be

> "* * * in the English courts, and in those courts which conform strictly to common law practice, we have no difficulty here, because, from the earliest times, we have departed from that practice, no *venire* is awarded in making up the record, and the record is made to exhibit a plain narrative and history of the proceedings as they occur."

The statement of Lord Tenterden in *Bernasconi* v. *Farebrother*, 3 B. & Ad. 372 (1832), is to the same effect. Whatever the reasons for the existence of the rule, there seems to be no question but that it existed, and it is recognized in the earliest American cases.

For instance, in *Boswell* v. *Jones*, 1 Wash. (Va.) 332 (1794), an action of trespass was brought against two de-

fendants. There was a verdict against one defendant and in favor of the other. The defendant against whom the verdict was rendered moved for a new trial and the new trial was granted. It was objected by Bushrod Washington, counsel for plaintiffs and later a Justice of this Court, that a new trial should not be granted on motion of one of the defendants, and the Court says:

> "The cases cited" (Rex *v.* Mawbey, Bond *v.* Spark, Berrington's Case and Kay *v.* Panchiman) "prove that in trespass against two defendants, if one be found guilty, and the other be acquitted, a new trial cannot be granted on the motion of the convicted defendant, and a majority of the court are of opinion that the rule is not without reason, since, the plaintiff being satisfied, it ought not to be in the power of the convicted defendant to bring his co-defendant into jeopardy again by obtaining a new trial. Upon authority, the rule is fixed. One judge doubted as to the reason of it, since the ground of new trials being to attain real justice, if the court perceive that injustice has been done in the acquittal of one defendant, upon principle it would seem right to grant a new trial, from whomsoever the motion might come. And as to authority, the same judge is of opinion, that though uniform decisions which establish the rules of property ought to be adhered to, yet he does not view them as sacred in point of practice, which may be varied as experience shall evince their convenience or inconvenience. But the court are unanimously of opinion, that though in general the subordinate courts need not state the facts on which they ground their opinion for a new trial, yet in this case, when they granted it, against an established rule of practice, they ought to have disclosed

the circumstances which induced them to depart from the rule. * * *"

In *Gardner* v. *Vidal,* 6 Randolph (Va.) 106 (1828), the Court says:

"For these reasons, the judgment must be reversed *in toto,* the verdict set aside, and a *venire de novo* awarded. There is no example of a verdict being set aside as to one issue, and suffered to stand as to others, and trying a cause by piecemeal."

In *Knowles* v. *Dow,* 22 N. H. 387 (1851), the Court said that it knew of no practice existing in New Hampshire which would justify setting aside a verdict in part.

In *Peed* v. *Brenneman,* 72 Ind. 288 (1880), the Court says:

"A new trial implies a re-examination of all, and not a part only, of the issues between the parties as to whom it is granted."

In *Tuttle* v. *Gates,* 24 Me. 395 (1844), the Court says:

"When a case is presented on a motion or petition for a new trial, or for a review, for any cause not arising out of an illegal or erroneous act of the Court, a new trial may be granted or refused by the Court in the exercise of its legal discretion. It cannot be claimed as a matter of right. And in such cases, it may be done upon such terms or conditions imposed, as the Court may consider reasonable. And such appears to have been the practice (Hutchinson *v.* Piper, 4 Taunt. 555, Thwaites *v.* Sainsbury, 7 Bing. 437, Winn *v.* Columbian Ins. Co., 12 Pick. 288). * * * When a case has been reserved on a report of the presiding

judge, or presented by a bill of exceptions, and it has been ascertained, that the instructions of the jury were erroneous, or that illegal testimony was admitted, or that legal testimony material to the issue was excluded, the party, if aggrieved, would seem to be entitled to a new trial as a matter of right; and the court can impose no conditions, unless it has acquired some authority from his consent to dispose of the case otherwise. If the Court may in this class of cases open a case again for the trial of a particular point without disturbing the general verdict, it should possess the power to form a new issue without the consent or action of the parties. Or, if the verdict be entirely set aside, a right to limit the inquiry to a particular point, although other points vitally affecting the merits, and presented as issues to be tried by the pleadings, might be insisted upon. Such a power would scarcely be claimed by a court governed solely by the rules of the common law."

There are state cases which relax the rigour of the common law rule. The most interesting of these are *Bicknell* v. *Dorion, supra,* and *Lisbon* v. *Lyman,* 49 N. H. 553 (1870). It should be noted in this connection that the constitutions of these states contain no such sweeping guaranty of jury trial as that contained in the Federal Constitution.

In *Clark* v. *New York, New Haven & Hartford Railroad,* 33 R. I. 83, 80 Atl. 406 (1911), we call especial attention to the following language of BLODGETT, *J.*, in his dissenting opinion, the correctness of which is not affected by the majority opinion:

"Every English case without exception cited in the majority opinion and decided prior to 1798, shows that

the division of issues on a new trial was conceded to be impossible. That a different view has since prevailed in certain minor English courts, such as before a jury in a Sheriff's Court as expounded by a common pleas decision in 1831, or even if it were authoritatively shown by a decision of the court of ultimate authority in England that a different practice now prevails, are equally beside the mark. It may be a desirable practice and it may later have been adopted in English courts, but it was not so considered or acted upon when this jurisdiction was originally granted in this colony in 1798, and no English case has been cited, even if any exist, which shows the fact to be otherwise, the earliest English case cited in the majority opinion being in 1831."

Cases like *Yazoo & Mississippi Valley Railroad* v. *Scott*, 108 Miss. 871, 67 So. 491, L. R. A. 1915E, 239, recognize frankly that the Court has judicially modified the common law, but this is exactly what a Federal court under the seventh amendment may not do.

We must bear in mind that the seventh amendment is applicable only to Federal tribunals and hence state cases are at best only illustrative of developments from the common law rule. Where the right of partial re-trial is deemed by State courts to exist at all, it is deemed to exist only in cases where the issues are clearly severable and is used sparingly. One of the leading cases is undoubtedly *Simmons* v. *Fish*, 210 Mass. 563. In this case a minor child lost one eye from a shot from an air gun discharged by the defendant's child, and the plaintiff alleged that the injury was due to the negligence of the defendant in permitting his son to have this dangerous plaything. The jury

returned a verdict for the plaintiff in the sum of two hundred dollars and the plaintiff moved for a new trial on the question of damages only. The motion was granted and the defendant alleged exceptions. In sustaining the exceptions, Chief Justice RUGG employed the following language:

> "The ancient common law doctrine that a verdict of a jury was single and indivisible and must stand or fall as a whole was early modified by the custom of this Commonwealth, as is pointed out in Bicknell *v.* Dorion, 16 Pick. 478, 483, where a verdict was set aside as to one of several defendants. The practice has prevailed for many years in this court of awarding a new trial upon a single point *where the error committed in the trial court was of a kind which could be readily separated from the general issues, and applied without injustice to one matter.*
>
> "* * * The Superior Court is a court of general jurisdiction, and it has the power to set aside verdicts and 'order a new trial for any cause for which a new trial may by law be granted' (R. L. c. 173, sec. 112), in which are included excessive or insufficient damages. If it is convinced upon a review of the whole case that the jury have settled the issue of liability fairly and upon sufficient evidence, so that dissociated from other questions it ought to stand as the final adjudication of the rights of the parties, and that there has been such gross error in the determination of damages as requires the setting aside of the verdict, that court has the power to do so, and confine a new trial to damages alone. *It is a power which ought to be exercised with great caution, with a careful regard to the rights of both parties, and only in those infrequent cases where it is certain and plain that the error which*

*has crept into one element of the verdict by no means can have affected its other elements.*

"* * * It is undoubtedly true that in England there can be no limitation of a new trial to specific issues without consent of both parties. There a new trial means a new trial as to all issues, unless by agreement of parties. Watt *v.* Watt (1905), A. C. 115, overruling Belt *v.* Lawes, 12 Q. B. D. 356, a contrary decision in the court of appeal. The great weight of authority in this country supports the conclusion we have reached.

"* * * *It is only in exceptional and extremely rare instances that the inadequacy of damages will not be so interwoven with liability that justice can be done without a new trial upon the whole case. Although we do not say that there cannot be such a case, it is hard to conceive of one.*" (Italics ours.)

The learned justice goes on to cite a number of Massachusetts cases in which the right to a new trial was restricted to single issues of the original action. In all these cases the re-trial was on issues readily severable from the other issues of the case, *e. g.*, whether plaintiff was duly appointed master of a house of correction (*Robbins* v. *Townsend*, 20 Pick. 345), whether a defendant was mentally competent (*Hubbell* v. *Bissell*, 2 Allen 196), the execution of a bond (*Amherst Bank* v. *Root*, 2 Metc. 522), whether according to mercantile usage Smyrna was a port in Europe (*Seccomb* v. *Provincial Ins. Co.*, 4 Allen 152).

*Simmons* v. *Fish* is followed in the later Massachusetts case of *Waucautuck Mills* v. *Magee Carpet Co.* (1916), 225 Mass. 31, 113 N. E. 573, in which the Court used the following language:

"It is hard to conceive of such a case. It is only when the reason for setting aside the verdict relates solely to damages dissociated from every other contributing, related or vitiating cause that 'the new trial shall be limited to the question of the amount of damages alone.' St. 1911, c. 501. Only by acting on this rule can justice be accomplished. See Opinion of Justices, 207 Mass. 606, 94 N. E. 846. Indeed, it recently has been said that 'partial new trials' is a 'practice * * * not to be commended.' Norfolk Southern R. R. *v.* Ferebee, 238 U. S. 269, 274, 35 Sup. Ct. 781, 59 L. Ed. 1903.

"Order granting new trial to stand."

Other New England states generally have adopted the same rule as that laid down by Chief Justice Rugg in *Simmons* v. *Fish, supra.*

In *McBride* v. *Huckins* (1911), 76 N. H. 206, 81 Atl. 528, the Court said:

"It is impossible to determine on which count of the declaration the damages were assessed, or whether both causes of action were considered by the jury in deciding upon the amount of their verdict. Peabody *v.* Kinsley, 40 N. H. 416. If the erroneous theory of liability adopted at the trial may have been considered by the jury on either count, as having some tendency to enhance the damages, their finding in that respect must be set aside, as well as their finding on the issue of liability. While it is true that when the error found to exist in a trial does not apply to or affect all the issues covered by the verdict a new trial of the entire case is not ordinarily ordered, but only so much of it is set aside as the error related to (Lisbon *v.* Lyman, 49 N. H. 553; Genest *v.* Company, 75 N. H. 365, 74 Atl.

593; Piper *v.* Railroad, 75 N. H. 435, 75 Atl. 1041), it must clearly appear that the effect of the error did not extend to all the issues tried. If the error ostensibly relates to the question of liability, it may still be of such a character as to have had a prejudicial effect on the jury's assessment of damages. If, for instance, it should be erroneously ruled in an action for negligence, that the defendant's previous conviction for theft might be considered on the question of liability, it would require little argument to show that it probably had a very prejudicial effect upon the jury's assessment of damages. While not technically relevant to any question in the case, it could not be said, in the absence of specific instructions not to consider it, that the jury did not make it a substantial element of the damages awarded. It would therefore vitiate the entire verdict."

And see the later cases of *Milford Quarry & Construction Company* v. *Boston & Maine Railroad* (1919), 79 N. H. 525, 107 Atl. 313, and *Dow* v. *Latham* (1922), 80 N. H. 492, 120 Atl. 258.

The rule in Vermont is applied in *LeFebre* v. *Central Vermont Railway Co.* (1924), 97 Vt. 342, 123 Atl. 211; *Parizo* v. *Wilson* (1929), 101 Vt. 514, 144 Atl. 856; *Griffin* v. *Boston & Maine Railroad* (1913), 87 Vt. 278, 89 Atl. 220.

In *Parizo* v. *Wilson*, the most recent case, the Vermont Court says:

"An error may ostensibly relate to one issue only, but be of such a character as to have a prejudicial effect upon the other, and in such a case a full re-trial should be had. Griffin *v.* Boston & M. R. R., *supra.*

> And although an error affects one issue only, a new trial on all issues is to be granted, where this will best subserve the ends of justice. Carpenter *v.* Central Vermont R. C., 90 Vt. 35, 38, 96 A. 373. In order that a partial new trial may be ordered, 'it must clearly appear that the effect of the error did not extend to all the issues tried.' McBride *v.* Huckins, 76 N. H. 206, 213, 81 Atl. 528, 531, 532."

The Rhode Island Court has said recently in *General Motors Truck Company* v. *Shepard Company* (1925), 47 R. I. 153, 130 Atl. 593:

> "The Shepard Company asks that the court modify its order remitting the case of the Shepard Company *v.* Truck Company for a new trial, and direct that such new trial shall be solely upon the question of the plaintiff's damages. We did find sufficient evidence to support the decision of the superior court that the Truck Company was bound by the contract and the warranties contained therein, as claimed by the plaintiff, and in accordance with our practice regarding findings of fact made by a justice of the superior court we held such finding to be without error. There was, however, substantial evidence presented by the defendant denying such liability on its part. In Clark *v.* N. Y., N. H. & H. R. Co., 33 R. I. 83, 80 A. 406, Ann. Cas. 1913B, 356, it was held to be within the authority of this court and the superior court to grant new trials upon the question of damages alone. *In view, however, of the conflicting evidence here upon the issue of liability, we are of the opinion that in justice to the defendant the trial should be a general one upon all the issues.*" (Italics ours.)

The Connecticut Court in *Murray* v. *Kremz* (1920), 94 Ct. 503, 109 Atl. 859, quoted with approval the language of Chief Justice Rugg in *Simmons* v. *Fish* that it is

> "only in exceptional and extremely rare instances that the inadequacy of damages will not be so interwoven with liability that justice can be done without a new trial upon the whole case."

The Court then goes on to say:

> "The vesting in a court of such a discretion is a very different matter from according to a litigant asking as of right that a new trial be so limited. A litigant should not be able to select for rehearing the issue decided adversely to him and retain those issues decided in his favor. As a rule, the issues are interwoven, and may not be separated without injustice to one of the parties.
>
> *"The practical difficulty of a rehearing before a new jury, for example, of the issue of damages while retaining the decision of the first jury upon the issue of liability is apparent. Usually these issues will be inextricably interwoven."* (Italics ours.)

For decisions outside the New England states, see *Gregg* v. *City of Wilmington* (1911), 155 N. C. 18, 70 S. E. 1070; *Kessans* v. *Kessans* (1915), 58 Ind. Appeals 437, 108 N. E. 380; *Friesen* v. *Insurance Co.* (1925), 119 Kansas 513, 240 Pac. 414.

**IN THE PRESENT CASE THE ISSUE OF DAMAGES IS NOT SEVERABLE OR CAPABLE OF RE-TRIAL ALONE.**

We believe that this Court must decide that even if a Circuit Court of Appeals under the Seventh Amendment may under some circumstances order a partial re-trial, it

could not do so in the case at bar without abridging the plaintiff's constitutional rights. For here the issue to be re-tried on the Court's mandate is not clearly severable but is inextricably interwoven with other issues of the case. See *Norfolk & Southern R. R.* v. *Ferebee,* 238 U. S. 269, 273, 59 L. Ed. 1303, 1305; *American Locomotive Co.* v. *Harris,* 239 Fed. 234, 240.

It is true that on the second trial the jury rendered a verdict for the defendant upon its counterclaim for unliquidated damages. It may fairly be inferred that the jury's verdict must have been based upon a finding (*a*) that there was a contractual relation between defendant and plaintiff; (*b*) that said contract was breached by the plaintiff; and (*c*) that the defendant suffered damages certainly and proximately flowing from said breach in the amount of $40,980.59. The jury was not asked to make any specific findings of fact and of course no appellate court would be warranted in making such findings or in imputing to the jurors any conclusions not inevitably involved in their verdict.

For example, there is now no way of telling what the jury thought the contract between the parties was for, whether for the installation of three Cross vapor phase treating towers as argued by the defendant or for one experimental tower as alleged in defendant's pleadings. It is impossible to tell whether the jury rendered its verdict on the defendant's first count alleging the acceptance of an oral proposal made in January 1926 or on the defendant's second count alleging the acceptance of the written proposal of February 6th. It is impossible to tell when the jury thought the contract was entered into or when the jury thought the contract was broken.

It is likewise impossible to tell whether the jury thought that the plaintiff had laid any basis at all for recovering lost profits, because the amount awarded by the jury to the defendant on its counter-claim, $40,980.59, was substantially less than the total of items of damage claimed by the defendant, other than the item of lost profits. These other items were:

| | |
|---|---|
| Depreciation (Record p. 692) | $55,927.04 |
| Cost Champlin treater (Record p. 255) | 26,751.18 |
| Excess cost Champlin treater (Record pp. 255, 733) | 5,200.00 |
| Chlorine treating plant (Record p. 357) | 6,800.00 |
| Operation chlorine plant (Record p. 693) | 20,196.10 |

It will manifestly be impossible for a new jury to reach any conclusion upon the defendant's damages without knowledge of what the contract was, of when it was made and of when it was breached. A jury in assessing damages must obviously pass upon the obligation of the defendant to mitigate damages. This obligation arises the moment breach has occurred. Hence the necessity for agreement in the minds of the jury upon the date of the breach. Obviously, however, a jury cannot determine when a contract was breached unless it knows what the contract was and when it was made. If this case is to go to a new jury for a new trial on the issue of damages only, how will that jury determine the nature of the contract, the time of its making and the time of breach without having all the evidence which the other jury had in order to reach its verdict?

The verdict of the other jury would be of no assistance to the new jury. It would be improper and exceptionable for the new jury to know what conclusion the previous jury

had reached or by what calculations it had reached its conclusions. It would likewise be improper and exceptionable to ask the new jury to base its verdict upon the language of an opinion of the Circuit Court of Appeals.

It would be a grievous mistake to assume, as the Circuit Court of Appeals for the First Circuit seems to have done, that the granting of a new trial on the issue of damages only would be a short cut towards the ends of justice in this case. Such a limited and restricted re-trial would do more than to infringe merely technical constitutional rights of the plaintiff. It would subject it to the great burden and expense of a re-trial in which a jury would be so confused and confined by the work of its predecessors that no just verdict could result.

## II

### THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT HAS ERRED IN APPLYING THE MAINE LAW OF SET-OFF.

The right to set-off is a purely statutory right. *Smith* v. *Ellis*, 29 Maine 422. The Maine statute applicable to set-off as referred to above is section 75 of Chapter 87 of the Revised Statutes of 1916, reading in full as follows:

> "A demand originally payable to the defendant in his own right, founded on a judgment, or contract express or implied, for the price of real or personal estate sold, for money paid, or had and received, for services done, for a liquidated sum, or for one ascertainable by calculation, may be set off."

It is not contended that this statute does not apply in the case at bar. There is no provision of the Federal statutes or of the rules of the United States District Court for the District of Maine relative to pleadings in set-off, and the

whole subject is undoubtedly governed by the so-called Conformity Act (Section 724 of Title 28 of United States Code Annotated).

The defendant's demand in set-off in the case at bar if it can be justified at all must be justified as a demand "for a liquidated sum, or for one ascertainable by calculation". It will not be contended that the demand is for a liquidated sum. Neither is it for a sum ascertainable by calculation within the interpretation of that language laid down by the Maine courts. How can it be said that the damage suffered by defendant in not having a treating tower or towers which had never been in operation anywhere in the world is to be ascertained by calculation? Calculation under this statute means an arithmetical process performed from known factors, *e. g.*, so many tons at so much per ton, so many bushels at so much per bushel. It does not mean mere estimation or conjecture. In the case at bar the jury, if it is to give the defendant any damages for loss of profits, as the Circuit Court of Appeals says it should, must ascertain what profits were in the contemplation of the parties at the time of making the contract, and how those profits are to be computed. The computation of those profits involves consideration of markets and the difference between price of straight-run and cracked gasoline, the amount of overhead, cost of treating, and many other factors. This is certainly not mere calculation. It is partly conjecture. Indeed the Circuit Court of Appeals has said that an instruction that profits must not be *in any degree* conjectural is too strict. And it is significant that the only computation of profits ever made by

a jury has been held erroneous because they were not allowed sufficient liberty to conjecture.

The defendant's damages in this case are no more to be considered "ascertainable by calculation" than damages in tort for a broken leg. The leading Maine case is *Hall* v. *Glidden*, 39 Maine 445, in which suit was brought to recover for services performed by the plaintiff for the defendant. The defendant endeavored to set off against the plaintiff's claim a claim for rent based upon an implied contract. The Court held that such a claim could not be regarded as a demand "for a sum liquidated, or one that may be ascertainable by calculation", the language of the statute then in force being substantially identical with that of the existing statute. The Court, speaking by Mr. Justice APPLETON, pointed out that there was no "sum liquidated", nor

> "any contract from which, by any calculation, the amount due for rent could be ascertained. The very contract itself and all its terms, were involved in controversy and dispute. The true construction of the words 'sum liquidated or one which may be ascertained by calculation,' contained in R. S., is to limit them to such judgments or contracts only as that the amount of the defendant's demand can only be ascertained by the judgment or contract itself, or by mathematical calculations on the same. Smith *v.* Eddy, 1 R. I., 476."

In the case at bar, as in *Hall* v. *Glidden*, the contract itself and all its terms are involved in controversy and dispute. See also:

*Hopkins* v. *Megquire*, 35 Me. 78;

*Stevens* v. *Blen*, 39 Me. 420;

*Fletcher* v. *Harmon*, 78 Me. 465;
*Ruggles Lightning Rod Co.* v. *Ayer*, 124 Me. 17.

In *Rogers* v. *Humphrey*, 39 Me. 382, the Court quotes the language of the Court in *Butterman* v. *Pierce*, 3 Hill (N. Y.) 171, as follows:

> "When the demands of both parties spring out of the same contract or transaction, the defendant may *recoup*, although the damages on both sides are unliquidated; but he can only *set off* where the demands of both parties are liquidated or capable of being ascertained by calculation."

However, there is no question of recoupment in the case at bar because the right of recoupment must spring from the same contract as that sued upon. *Winthrop Savings Bank* v. *Jackson*, 67 Me. 570. In the present case, it does not. Article Fifteenth of the license contract so provides (Record p. 15).

The majority of the Circuit Court of Appeals in its opinion ignore all of the above cases, assert that the defendant's right of counterclaim or set-off is "not to be determined on any narrow or technical construction of the Maine statute" above referred to and cite *Collins* v. *Campbell*, 97 Me. 23, 53 A. 837, *Crummett* v. *Littlefield*, 98 Me. 317, at page 320, 56 A. at p. 1054, *Rodick* v. *Pineo*, 120 Me. 160, 166, 113 A. 45, 49, *Peterson Oven Company* v. *Fickett*, 121 Me. 413, 417, 117 Atl. 575, 578, *Morse* v. *Moore*, 83 Me. 473, *The Gloria*, 286 Fed. 188, 192, *Johnson* v. *White Mountain Creamery Association*, 68 N. H. 437, 36 A. 13, and 34 Cyc. 629, 630, 644.

A glance at these cases will convince the Court that they have not overruled *Hall* v. *Glidden, supra,* and are not aptly cited.

In the first case cited, that of *Collins* v. *Campbell,* there were cross actions based on judgments recovered in the Common Pleas Division of the Supreme Court of Rhode Island. The plaintiffs in *Campbell* v. *Collins* moved that an order be made directing the judgment which might be recovered in that action to be set off *pro tanto* against the judgment recovered in the action of *Collins* v. *Campbell,* except as to the taxable costs in each suit. The Court held that the set-off was a proper one. There would have been no question but that the judgments could have been set off against one another if the same had originally been recovered in the courts of Maine, and the Court held that equity could apply the rule to foreign judgments and that there was no practical reason why it should not have done so.

*Crummett* v. *Littlefield,* 98 Me. 317, was a bill in equity brought to redeem a mortgage on real estate in which the plaintiff contended that by virtue of the covenant against encumbrances contained in the deed of warranty of the premises given to him by the defendant's intestate, he was entitled to have the amount of certain tax liens outstanding on the mortgaged premises deducted from the amount due on the mortgage and to have a decree only for the balance. The mere statement of the case suffices to show its radical dissimilarity from the case at bar. The Maine Court in the portion of its opinion quoted by the Circuit Court of Appeals and elsewhere deals with the difference between the right of set-off in equity and the statutory right

of set-off but nowhere asserts the right of a court of law to override the statute.

Likewise, in *Rodick* v. *Pineo*, 120 Me. p. 166, the Court was discussing the right to set-off in equity. The language used on pages 166 and 167 of the opinion to which the Circuit Court of Appeals refers is all in reference to an equitable right.

Similarly, the language quoted from *Scott* v. *Armstrong*, 146 U. S. 499, 36 L. Ed. 1059, and *Merrill* v. *Cape Ann Granite Co.*, 161 Mass. 212, relates to the chancery practice.

The case of *Peterson Oven Company* v. *Fickett, supra*, was an action *in assumpsit* on twenty promissory notes given by the defendant to the plaintiff for the construction of a baker's oven. The defense was failure of consideration due to breach of warranty and the whole case turns on the right of recoupment. It has nothing whatever to do with the right of set-off.

*Morse* v. *Moore*, 83 Me. 473, is also a case on the alleged breach of warranty of a contract for sale of a certain quantity of ice. It has nothing whatever to do with the right of set-off.

The New Hampshire case of *Johnson* v. *White Mountain Creamery Association*, 68 N. H. 437, 36 Atl. 13, is also a recoupment case involving no question of set-off.

The various cases reported under the title of *The Gloria* in 286 Fed. 188, were admiralty cases decided in the District Court for the Southern District of New York. In so far as the decision relates to the law of counterclaim the question arose in an action brought by the Kingdom of Norway against the Federal Sugar Refining Company.

The defendant sought to counterclaim against the sovereign Kingdom of Norway damages for breach of contract to purchase sugar. The Maine statute was in no way involved and counsel for the Sugar Company expressly contended that under the New York Civil Practice Act it was not limited to claiming on a cause of action arising out of the contract or transaction set forth in the bill of complaint. The Court held, however, that even if this were not true the counterclaim in this particular case could be regarded as arising out of the same transaction as the original complaint, and so the counterclaim was sustainable even as against a sovereign. The Court's historical observations about the nature of the right of counterclaim are in reference to its applicability as against a sovereign state. The Court points out that such rights were unknown to the common law. The statement that "the right of counterclaim and set-off * * * as between litigants is something more than a procedural convenience and is really a requirement of substantive justice" is one with which we have no desire to quarrel.

If the objection to allowing the defendant in this case to proceed by set-off rather than by cross action were procedural merely it would not be entitled to great weight.

But the Maine legislature appreciated, as have other legislatures, that when an unliquidated claim or a claim for an amount not ascertainable on any obvious arithmetical basis is offset against a liquidated claim, the unliquidated claim which may be vague and indefinite as is defendant's claim here gains a certain majesty and definiteness from the claim to which it is opposed. A jury cannot

deal with it on the same terms or appraise it in the same way as if it were an independent suit. This we believe to be the reason for the Maine statute and we see no reason in the case at bar for disregarding the statute or considering it unduly technical. The defendant in this case cannot becomingly seek to import an equity rule on to the law side of the Court, because it resisted and successfully resisted a trial of the case on the equity side of the Court where equitable principles would have been applied by the District Judge. We are not arguing that defendant should not try out its case on this alleged breach of contract in the Maine forum if it likes. The plaintiff came to Maine to sue and is willing to be sued there in a cross action as the Circuit Court of Appeals suggests in next to the last paragraph of its opinion (29 Fed. 2nd, 339). But the plaintiff has consistently objected and still objects under the statute to having this claim vague, indefinite and based on facts far too complicated to be intelligible to an ordinary jury tied hand and foot to the plaintiff's claim in an admitted amount. To set off judgments would involve no injustice. To set off a contested claim against an uncontested one does. The whole argument of the Circuit Court of Appeals based on the injustice of not permitting cross suits in the Maine District misapprehends the basis of plaintiff's objection and is irrelevant.

There is nothing in the passages quoted from *34 Cyc.* which affects the validity of the plaintiff's argument. The two paragraphs cited, one entitled "Counter-claim" and the other "Set-off, counterclaim and defense distinguished", are very general in their language, but it may

be worth while to notice the closing sentence (p. 631) of the former paragraph:

> "But even under the most liberal practice of the codes defendant cannot counterclaim any and every cause of action he may have against plaintiff, without regard to its nature, but only such a cause of action as constitutes a valid counterclaim under the code."

Judge JOHNSON, in his dissenting opinion on the first appeal (29 Fed. 2nd at page 339), holds that "the Maine statute in reference to set-offs is binding" and that the requirement of the statute that the damages must be capable of ascertainment is not merely technical but is substantial. He agrees with the majority opinion in considering that the damages though "not technically ascertainable by calculation" might be so considered by giving a "liberal construction" to the Maine statute, and in so doing overlooks the Maine cases cited above. Judge WILSON, on the other hand, in his brief opinion in 39 Fed. 2nd at page 524, flatly expresses his unwillingness to approve the view that the defendant's claim is a proper account in set-off under the Maine statute. As Judge WILSON was for many years a member of the Supreme Judicial Court of Maine and for some years Chief Justice of that Court, we believe that this Court will consider his dissent on this point of Maine practice authoritative. Taken in connection with the Maine cases cited, *supra*, pp. 49, 50, we believe that this dissent shows the majority of the Circuit Court of Appeals as plainly in error.

Indeed, within six months of its first opinion in this case, the Circuit Court of Appeals for the First Circuit seems to

have reversed itself on this very question. For in the case of *McCallum* v. *Wing*, decided on April 9, 1929, and reported in 31 Fed. 2nd at page 940, the Court was considering a question of set-off under the general laws of Massachusetts (1921), Chapter 232, section 1, which reads as follows:

> "If at the commencement of an action upon a judgment or upon a contract, express or implied, for property sold, for money paid, for money had and received, for services performed and for an amount which is liquidated or may be ascertained by calculation, the defendant has in his own right a claim against the plaintiff such as is hereinbefore mentioned or such a claim which has been assigned to him with notice thereof to the plaintiff, it may be set off against the plaintiff's claim as hereinafter provided."

It will be seen that this language is virtually identical with that of the Maine statute. The somewhat complicated facts at issue are more fully set forth in the earlier opinions in the same case, 254 Fed. 5, 299 Fed. 311, 4 Fed. 2nd, 177, 30 Fed. 2nd, 505. The action was brought to enforce the obligation of a subscriber under a syndicate for subscription for corporate stock and the defendant made a claim of set-off based on an alleged proportional share due to him under his participation certificate from the amount collected by the plaintiff as trustee. Judge JOHNSON says:

> "* * * there are several reasons why the District Court did not err in disallowing defendant's claim of set-off; (1) A claim of set-off must be for a liquidated amount, or for an amount that may be ascertained by calculation. General Laws of Massachusetts, c. 232,

sec. 1. The defendant's claim was not for a liquidated amount, or one ascertainable by calculation."

It is difficult to see the distinction between this case and the case at bar.

The construction which the Massachusetts Court has given to this statute has consistently been the same as that for which the plaintiff contends. See:

*Cardell* v. *Bridge*, 9 Allen 355;
*Montague* v. *Boston & Fairhaven Iron Works*, 97 Mass. 502;
*Taft* v. *Larkin*, 123 Mass. 598;
*Barry* v. *Cavanagh*, 127 Mass. 394;
*Ford* v. *Burchard*, 130 Mass. 424;
*Tracey* v. *Grant*, 137 Mass. 181;
*Rice* v. *Sanders*, 152 Mass. 108;
*Taylor-Stites Glass Co.* v. *Manufacturers' Bottle Co.*, 201 Mass. 123.

## III.

THE CIRCUIT COURT OF APPEALS IN APPLYING THE OKLAHOMA LAW AS TO INTEREST ON UNLIQUIDATED DAMAGES HAS OVERLOOKED THE OKLAHOMA STATUTE AND CITED AN OKLAHOMA CASE IN SUPPORT OF ITS OPINION WHEN ITS HOLDING IS THE REVERSE.

The applicable Oklahoma statute (Oklahoma Compiled Statutes 1921, Section 5972) reads as follows:

"Any person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover in-

terest thereon from that day, except during such time as the debtor is prevented by law, or by the act of the creditor, from paying the debt."

The foregoing language is clear and is made clearer by the following section which allows interest to be given "in the discretion of the jury" "in an action for the breach of an obligation not arising from contract, and in every case of oppression, fraud, or malice." The natural inference from this statute is that interest is not allowed on claims for unliquidated damages arising out of the breach of contract.

In the face of these statutes, the Circuit Court of Appeals for the First Circuit employed in its opinion the following language:

"We think that the jury should have been instructed to allow interest on any excess cost of any substitute purifier, which the jury found as an element of damages, from the date when the substitute purifier was furnished or should have been furnished (St. Paul Fire & Marine Insurance Company *v.* Robison, 72 Okla. 262); and also might, in their discretion, in order to do full justice between the parties, allow interest on any amount of lost profits which they found due the defendant by reason of plaintiff's breach of contract."

The case of *St. Paul Fire & Marine Insurance Company v. Robison, supra,* decided in 1919 and further reported in 180 Pac. 702, cited as an authority in support of the language quoted, is in fact an authority to the contrary. This was an action brought under a hail insurance policy for damages to a cotton crop. The plaintiff recovered judg-

ment for $146.20. The following excerpt from the opinion is self-explanatory:

> "The court instructed the jury that if it found for the plaintiff that it allow him interest at 6 per cent. from December 1, 1916, on the amounts found, and it is urged by the defendant that said instruction is violative of section 2848, Rev. Laws of 1910. In the case of City of Chickasha *v.* Hollingsworth, 56 Okla. 341, 15 Pac. 859, this court held that interest was not recoverable on unliquidated damages where it was necessary for a judgment on verdict to be rendered in order to ascertain the amount of such damage. The instruction was therefore erroneous, and the judgment was excessive in the small amount of the interest so allowed which is less than $5."

The apparent misapprehension by the Circuit Court of Appeals of the Oklahoma law is important because the Oklahoma law is the law of the place where the contract was made and also the law of the place where the contract was to be performed and is therefore governing as to the measure of damages.

*Atwood* v. *Walker*, 179 Mass. 514;
*Sandham* v. *Grounds*, 94 Fed. 83;
*Home Land & Cattle Co.* v. *McNamara*, 145 Fed. 17;
12 *C. J.* 486.

## IV.

THE DECISION OF THE CIRCUIT COURT OF APPEALS AS TO WHETHER THE EVIDENCE IN THE CASE WARRANTED ITS SUBMISSION TO THE JURY IS UNTENABLE AND IN CONFLICT WITH THE GREAT WEIGHT OF AUTHORITY.

We will not take the time for an exhaustive discussion of the testimony relating to the most important question of law in this case as to whether there is any evidence whatever that a contract was ever entered into for the erection by the plaintiff for the defendant of one or more Cross vapor phase system treating towers. We wish, however, to call the Court's attention particularly to the conference of January 27, 1926 as related by Champlin (Record pp. 55-58), by Welling (Record pp. 372-378), by Keith (Record pp. 590-595), the conference on February 6th as related by Champlin (Record pp. 60-64), by Harvison (Record pp. 272-277), and by Keith (Record pp. 592-604), the testimony regarding the execution of the three contracts (Record pp. 76-81, 280-282, 618-620), the conferences of May 18th and 19th in New York (Record, pp. 83, 84, 283-285, 443-444, 620-623), and the testimony of Keith regarding the negotiations which occurred between the parties during the months from June to October of 1926 (Record pages 625 to 635). We believe that this testimony, which except in a few minor details is entirely uncontradicted, establishes beyond a possibility of doubt that there was at no time any express acceptance by the defendant of any offer whatever for the installation of treating towers and that there was no moment of time during these negotiations, at which

there was any intention on the part of the defendant to accept in terms either offer described in its counterclaim.

The testimony clearly shows that the written offer of February 6th was not the offer of the plaintiff (Plaintiff's Exhibit F, Record p. 370, Defendant's Exhibit 65, Record p. 745). These two exhibits are identical. Champlin, the president of the defendant, further testified (Record pp. 162, 163) that the letter of February 6th was not as the Circuit of Appeals had stated in its first opinion, 29 Fed. 2nd, 336, "a re-statement of the offer made by Welling and Keith to Champlin in January" because Champlin alleges that that offer was for three towers instead of for one as stipulated in the letter. There is no evidence whatever of an unconditional acceptance by defendant of any offer, oral or written, on February 6th and we submit that the defendant's whole theory of an implied acceptance on March 20, 1926, at the time of executing the written contracts of any offer, either oral or written, relating to a treating tower is wholly unjustifiable. We submit that the evidence clearly shows that the defendant never was willing to accept unconditionally any offer made it with reference to the Cross vapor phase system of treating unless accompanied by a guaranty that this process would be commercially feasible and would not expose the defendant to patent litigation. That such a qualified acceptance of an offer does not create a contract is a well-recognized doctrine applied in such cases as:

*Minneapolis & St. Louis Railroad Co.* v. *Columbus Rolling Mill Co.*, 119 U. S. 149, 30 L. Ed. 376.

*Iselin* v. *United States*, 271 U. S. 136, 70 L. Ed. 872.

*Martin* v. *Northwestern Fuel Co.*, 22 Fed. 596;
*Phenix Insurance Co.* v. *Schultz*, 80 Fed. 337 (C. C. A. 4th Cir.);
*Travis* v. *Nederland Life Insurance Co.*, 104 Fed. 486 (C. C. A. 8th Cir.);

and by such Oklahoma cases as:

*St. Louis Smelting & Refining Co.* v. *Nix*, 101 Okla. 197, 224 Pac. 982,

and cases cited therein.

See also

*Williston on Contracts*, 1920 Edition, Volume I, Sections 72 and 73.

## V.

THE CIRCUIT COURT OF APPEALS ERRED IN HOLDING "THAT THE DEFENDANT DID, ON THE WEIGHT OF EVIDENCE, MAKE OUT A CLAIM FOR A SUBSTANTIAL SUM OF LOST PROFITS AS DAMAGES".

The correct rule of law as to damages recoverable for loss of profits has repeatedly been laid down by this Court and by other Federal Courts following the classic English case of *Hadley* v. *Baxendale*, 9 Exchequer 341.

*Howard* v. *Stillwell & Beirce Mfg. Co.*, 139 U. S. 199, 35 L. Ed. 147;
*Globe Refining Co.* v. *Landa Cotton Co.*, 190 U. S. 540, 47 L. Ed. 1171;
*Norfolk Sand & Gravel Corp.* v. *Ohio Locomotive Crane Co.* (1914) (C. C. A. 4th Cir.), 217 Fed. 25;
*Central Trust Co.* v. *Clark*, 92 Fed. 293 (C. C. A. 8th Cir.).;

*Sanford Coal Co.* v. *Wisconsin Bridge & Iron Co.* (C. C. A. 7th Cir.), 293 Fed. 735.

The plaintiff's position briefly stated is this: that there was no evidence of any understanding between the parties at any time as to damages which would be recoverable for failure to install the treating tower or towers in question. As there was no contract to install such towers, there could have been no understanding at the time of making such a contract and the defendant's attempt to impute such an understanding from a letter (Defendant's Exhibit 1) written a full year before the other written contracts were signed can scarcely be taken seriously. On the contrary, all the evidence shows that the plaintiff made no representations of any kind as to the profits which would have resulted to anyone from the use of this wholly untried and experimental process and practically all the testimony was to the effect that the process would in actual operation have been prohibitively expensive and hence commercially unprofitable (Record pp. 444, 445, 625).

## CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the judgment of the Circuit Court of Appeals should be reversed and the case remanded to the United States District Court for the District of Maine, Southern Division, for a new trial on all the issues involved.

JOHN B. MARSH,
ROBERT HALE,
*Counsel for Petitioner.*

August, 1930.

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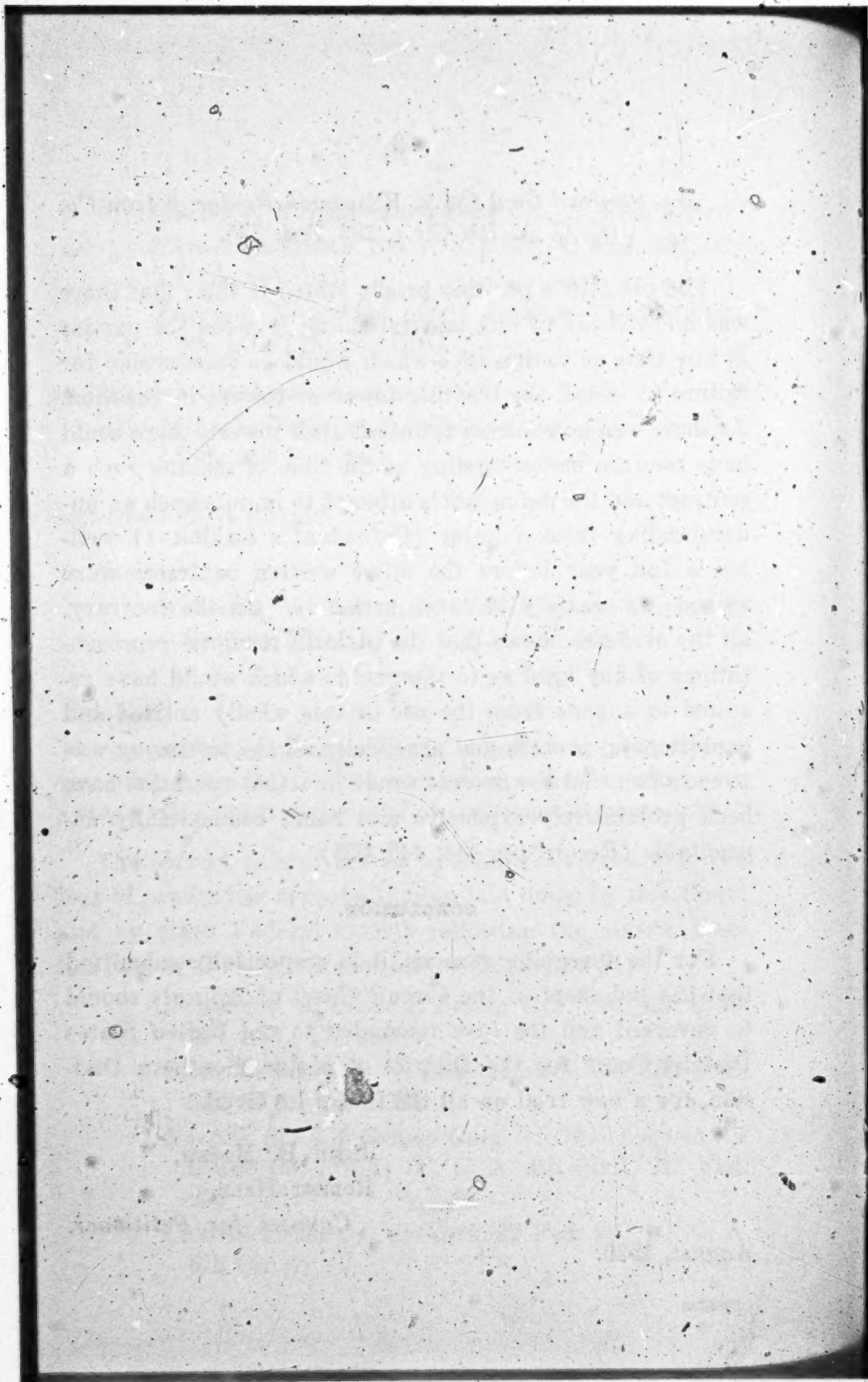

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CHARLES ELMORE CROPLEY
CLERK

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930.

No. 362.

GASOLINE PRODUCTS COMPANY, INC.,
PETITIONER,

VS.

CHAMPLIN REFINING COMPANY.

## ANSWER TO THE PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT AND BRIEF IN SUPPORT THEREOF.

HORACE G. McKEEVER,
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### ANSWER

*To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:*

The defendant, Champlin Refining Company, a corporation, incorporated under the laws of the State of Maine, the defendant below and hereinafter referred to as the defendant, respectfully prays that the writ of

certiorari prayed for by the plaintiff herein, Gasoline Products Company, Inc., be denied.

STATEMENT OF FACTS

The plaintiff herein in its petition and brief has set forth a statement of the facts which statement is substantially correct, yet there are certain facts which the defendant claims are not covered by the statement made by the plaintiff which necessarily should be pointed out to more clearly advise the Court of the defendant's position.

As stated by the plaintiff, the case involves the correction of rulings of the Circuit Court of Appeals for the First Circuit relating to the conduct of jury trials in the United States Courts, though it is the contention of the defendant that the case does not call for an interpretation of the statutes of either the State of Maine or the State of Oklahoma, for the reason that the interpretation of the statutes of the State of Maine by the Circuit Court of Appeals of the First Circuit, in its decision in this case reported in the 29 Federal Reporter, 2nd Series, p. 331, is an adjudication whereby the plaintiff is precluded from raising the question of such interpretation for the reason it took no appeal from the Circuit Court of Appeals at the time of said adjudication.

That there is no occasion for this court to pass upon the interpretation of the statutes of the State of Oklahoma for the reason that the question involved there is whether or not interest should be allowed on a claim for damages and inasmuch as the

case was remanded by the Circuit Court of Appeals for the purpose of trying the question of damages only, interest being an item of the damage claimed, any error on the allowance of interest, if there was such, may still be corrected.

It is true the controversy relates entirely to a defense set up by this defendant in a plea of "counterclaim in set-off," the defendant not having contested its liability to pay the plaintiff's claim which was a claim for royalties earned of 10c per barrel on the throughput, a charge for the use of the Cross Cracking Process used in defendant's refinery at Enid, Oklahoma.

The defendant, in pleading its counterclaim in set-off, divided its counterclaim in two counts as set forth in plaintiff's petition herein. The two counts, however, cover but one cause of action, the first count alleging the existence of an oral contract and obligation (Record pp. 22 and 24) entered into between the plaintiff company and the defendant company, through a proposal made by Mr. C. H. Welling, vice-president of the plaintiff company and P. C. Keith, Jr., its selling agent, in the month of January, 1926, and accepted by Mr. Champlin as president of the defendant company at a conference with Mr. Harvison and Mr. P. C. Keith, Jr., selling agents for the plaintiff company on February 6, 1926, wherein Mr. Champlin agreed to install the Cross Cracking Process for cracking petroleum oil under the Cross patents and pay the 10c per barrel throughput as royalty upon the condition that the plaintiff, Gasoline Products Company, Inc.,

would install in connection therewith the vapor phase treating system to treat the cracked gasoline which was necessary to make it marketable.

The second count does plead a written proposal signed by Cross Engineering Company by P. C. Keith, Jr., vice-president, Mr. Keith being the selling agent who accompanied Mr. Welling and Mr. Harvison at the times of their negotiations with Mr. Champlin in January and February, and alleges further that said proposal was accepted by Mr. Champlin.

The Circuit Court of Appeals in its first opinion, 29 Federal, 2nd Series, pp. 336-7, has found that the written memorandum of February 6th set forth in Record p. 44 was in its nature but a restatement of the offer made by Mr. Welling and Mr. Keith to Mr. Champlin in January; that Mr. Champlin on February 6th committed the defendant to acceptance of the plaintiff's entire proposition conditioned only upon his financing. At the time Mr. Champlin accepted the proposal on February 6th made by the plaintiff for the vapor phase treating system, the only condition attached to the consummation of the agreement was that Mr. Champlin would be able to finance his company through the issue of bonds, and as the court says, "This condition was removed on February 26th, thus leaving the whole offer accepted" (Record pp. 68 and 71).

It will be borne in mind that when the defendant definitely selected the Cross Cracking Process as the one it desired to purchase, it did so by reason of the inducement (Record p. 56) held out by the plaintiff's agents that the plaintiff company would install at the

same time and in connection therewith, and royalty free, the vapor phase treating system so that the product from the cracking plant would be made immediately marketable; that the question of the necessity of a treating plant and the kind available had been discussed and regardless of the kind of cracking plant to be purchased, the Gray vapor phase process was discussed and recommended, but, on this process, the defendant company would have been compelled to pay 6c per barrel, finished product, as a royalty, and upon an agreement with the plaintiff to install its Cross vapor phase system of treating the unfinished gasoline, royalty free, a discussion of the Gray process was ended.

There was some contention that Mr. Keith represented the Cross Development Corporation, one of the several Cross Companies, instead of the Cross Engineering Company whose name he signed to the letter outlining the proposal (Record p. 44), and also that he did not represent the plaintiff, Gasoline Products Company, Inc., but the defendant contended throughout the trial of the case that by reason of the fact that Mr. Welling was vice-president of the Gasoline Products Company, Inc., the plaintiff herein, Mr. Keith its selling agent, and later Mr. Harvison admittedly its selling agent, and in the light of the letter embodying the Welling proposal written by Mr. Keith reciting that he, Keith, "was directed by Mr. C. H. Welling, Vice-President of the Gasoline Products Company, Inc.," to outline the proposition, the defendant claims it made sufficient proof that the letter outlining the proposition to

install the treating system was the act of the plaintiff company, and furthermore, that while the written memorandum refers to the treating system as "installation of a Cross vapor phase system treating tower," yet the evidence shows (Record pp. 81-82, 92 and 158) that the oral agreement was that the defendant company should have a treating system of the same capacity as the cracking plant so that the cracked unfinished gasoline would be immediately treated for market.

It developed in the trial of the case (Record p. . . .) that at or near the time the plaintiff company refused to install the treating system and urged the defendant company to install the Gray treating system, that the Kellogg Company of which Mr. Harvison was vice-president, and which company was selling agent for the plaintiff's cracking process (Record p. 295), and which company through the plaintiff secured the contract for construction of the Cross cracking plant for defendant (Record p. 56), had made some kind of an agreement with Mr. Gray whereby it would urge the installation of his patent treating system instead of that of the Cross, notwithstanding about that time, the plaintiff had sent a Mr. Schofield, patent attorney from Kansas City, Missouri, to convince Mr. Champlin, president of the defendant company, that the proposed Cross vapor phase system treating tower was not an infringement upon the Gray tower as Gray contended (Record p. 58).

The record does not disclose and it is impossible to fix exact dates, but on the 13th day of May, 1926, when the work on the contract for construction of the

cracking plant was being advanced by the Kellogg Company who had the contract of construction, Mr. Champlin for the defendant company, realizing that no vapor phase treating system was being installed, wired the plaintiff for definite information when he might expect the complete plans and specifications for the vapor phase treating towers (Record p. 82). This started the controversy as to whether or not the Gasoline Products Company, Inc., was to furnish this treating system, it contending Mr. Champlin never accepted its proposal to install the treating plant royalty free, and this being near the time when Mr. Harvison for the Kellogg Company made some arrangement with Mr. Gray to take over the sales rights for Gray's process (Record pp. 313 and 315). This is about the time that Mr. Keith and others in behalf of the plaintiff were so insistent on Mr. Champlin abandoning his demand for the royalty free treater and installing the Gray treater (Record p. 115) which carried with it a royalty of 6c per barrel on the finished product, contending at the same time (Record pp. 115 and 147) that the expense of operation of the Cross treater was prohibitive or that it wasn't feasible commercially, and this was after Mr. Gray and Mr. Harvison had had a difference at Enid, Oklahoma, when both were trying to interest Mr. Champlin in the sale of their respective patent processes (Record p. 449).

Mr. Champlin for his company insisted on the installation of the Cross treating system as was the contract and also insisted that the installation was to be of sufficient capacity whether one tower or three,

(Record pp. 81-82, 92 and 158), to cover the output of the cracking plant, and after the failure of the plaintiff to install the Cross treating system and the construction of the cracking plant was finished, the defendant company commenced negotiations for the construction of a treating system based on a certain German patent which had expired (Record pp. 69 and 70), the plan of which came into its hands through Mr. Schofield, the patent attorney from Kansas City, who was sent by the plaintiff to convince Mr. Champlin that Gray's patent was copied after the German, and that the Cross patent was not an infringement of the Gray (Record p. 58).

After negotiations with the Kansas City Structural Steel Company which at first refused to construct the treating towers because of a warning from Gray that it would be an infringement, the plaintiff company finally erected treating towers patterned after the old German patent ready for use in the month of February, 1927, but the cracking plant had been completed since the month of September, 1926 (Record p. 181), and by reason of not having the treating plant ready at the time the cracking plant was ready for operation, there was a delay of about five months and a half in treating the unfinished gasoline and preparing it for market.

The loss occasioned by this delay constitutes the principal item of damage claimed by the defendant, it being the contention of the defendant that it lost its profits on the sale of the finished gasoline, and that this loss was not only susceptible of calculation as

required by the law, but was in fact by it calculated to a reasonable certainty and to the degree the law required to justify a recovery (Record pp. 240-255 inc., and 692-694 inc.). Moreover, when the defendant purchased the license to use said cracking process from the plaintiff, the profits, defendant claims, were within the contemplation of the parties, plaintiff's agent having presented to Mr. Champlin, president of the defendant company, detailed estimate of the profits based on refining the same quality of oil as the defendant company was refining which estimate included the cost of treating the unfinished gasoline (Defendant's Exhibit 1, Record pp. 716-725 inc.). Exhibit 1 includes what the plaintiff company termed guaranteed results (Exhibit 1, Record p. 719). On the following pages the recovery of gasoline was reduced to dollars and cents showing a monthly guaranteed yield of profits on the same capacity as the Champlin cracking plant, 4000 barrels, of $77,965.00 using gas oil as charging stock and $75,766.00 monthly using kerosene distillate as charging stock, both on an investment of $455,000.00.

The jury returned a verdict as set forth in plaintiff's petition herein, that is, for the total amount of the royalties earned which was not denied, including interest, of $61,530.56 and a verdict in favor of the defendant on its account in set-off of $40,980.56, leaving a balance due the plaintiff in the sum of $20,449.97 on which interest was calculated at the time judgment was entered making a total judgment of $23,032.85. The verdict by the jury does not imply a belief on the

part of the jury in the existence of some contract for treating apparatus, but it is conclusive that the jury was convinced and did find that such a contract existed and that it was violated and broken by the plaintiff and it did not become necessary and was not necessary for the jury to indicate whether its verdict was rendered on the first count or on the second count of defendant's counterclaim in set-off, as both counts include one continuous transaction, combining a number of circumstances which constituted a proposal and an acceptance by the defendant, thereby consummating a contract.

The plaintiff in its Petition for a Writ of Certiorari herein filed has correctly stated the issues raised by the parties in the second appeal which, briefly stated, were, on plaintiff's exceptions:

(1) Whether on all the evidence the Court should have left to the jury the question as to the existence of the contract and its breach by the plaintiff.

(2) Whether on all the evidence the Court should have left to the jury the question as to whether any loss was sustained by the defendant as a result of the alleged breach of such contract.

The only issue raised by the defendant on its appeal, both parties having appealed from the trial court to the Circuit Court of Appeals, was the exceptions taken to the judge's charge to the jury, and the verdict was set aside by reason of error of the trial judge in his charges as to the degree of certainty of damages recoverable for lost profits, and the case was remanded for a new trial on the question of damages

only. This was the result of a second trial of this case before the Circuit Court of Appeals as reported in the 39 Federal 2nd Series, p. 521.

The plaintiff in its petition sets forth five specifications of errors and six reasons why the prayer of its petition for a writ of certiorari should be granted.

This defendant says that the Circuit Court did not err in any particular to the prejudice of the plaintiff, and that the reasons set forth in said petition for granting the writ are not sufficient under the law and evidence as disclosed by the record, and the writ should be denied.

The defendant, therefore, respectfully prays the Court that the petition and prayer for the Writ of Certiorari of plaintiff be denied, and that the Court make such other and further order as to this Honorable Court may seem just and proper.

CHAMPLIN REFINING COMPANY,
By HORACE G. McKEEVER,
HARRY O. GLASSER,
*Counsel for Defendant.*

*Of Counsel:*
WILLIAM S. LINNELL,
CARL C. JONES,
EMERY O. BEANE.

*State of Oklahoma, County of Garfield, ss.*

Horace G. McKeever, being duly sworn, says that he is the counsel for Champlin Refining Company, the defendant; that he prepared the foregoing answer and that the allegations thereof are true as he verily believes.

.....

Sworn to and subscribed before me this .... day of September, 1930.

.....
Notary Public.

## BRIEF IN SUPPORT OF THE OPPOSITION TO THE PETITION FOR THE WRIT.

The petitioner has divided its argument in five subdivisions. We will discuss them in the order named in plaintiff's brief.

### I.

**Has the Circuit Court of Appeals for the First Circuit in remanding the case to the District Court for retrial "on defendant's damages only" abridged plaintiff's constitutional right to jury trial?**

There will be no controversy over the fact that one cannot be deprived of a right to a jury trial as provided under the Seventh Amendment to the Federal Constitution, but the question here is on a specific case and whether or not in that specific case the plaintiff, by the case being remanded to be retried "on defendant's damages only," has been denied that constitutional right.

The plaintiff in its brief has cited, quoted at length from, and apparently relies on the case of *McKeon* v. *Central Stamping Company*, 264 Fed. 385. By referring to Shepard's Citator, we can find no place where this case has been approved, cited, or commented upon, and it stands alone as authority which, in relation to the facts, is very similar to the case at bar.

The Constitution preserves the right of jury trial and we submit to this Court that unless the plaintiff

has lost something which the Constitution preserves to it, the seventh amendment could not be violated.

There is in the case at bar issues which are severable, for instance:

First, was there a contract?
Second, was there a breach?
Third, was there damage sustained?
Fourth, how much?

The plaintiff has had a jury trial and by its verdict has determined there was a contract and that it was breached, and the Circiut Court of Appeals has agreed with the jury and has decided that the record sustains the jury on these two points.

In remanding the case for a trial "on defendant's damages only," the Circuit Court of Appeals has found that the jury, in arriving at the amount of damages, were not given the proper charge by the Trial Court and to the prejudice of the defendant, therefore, upon a retrial of the issue of damages only, the plaintiff loses nothing because that preserves the right of the plaintiff to show by competent evidence that there was no damage to the defendant, and it would not be precluded by such retrial from having considered all of the circumstances and facts which would tend to disprove the claim of the defendant that it had suffered a damage nor would it be precluded from offering its evidence to minimize the damage.

Plaintiff, in its brief, has anticipated the defense of the defendant by citing the different authorities upholding defendant's contention, among which it

cites the case of *F. E. Atteaux & Co.* v. *Pancreon Mfg. Co.*, 22 Fed. 2nd, 749. It will be observed that this is a later case than the McKeon case, *supra*, relied on by the plaintiff, and that the Circuit Court of Appeals of the First Circuit has not been convinced that its former opinion in the case of *Farrar* v. *Wheeler*, 145 Fed. 482, is erroneous, nor has it been convinced by the decision in the McKeon case from the Third Circuit that its former opinions were erroneous, and in the face of the McKeon case has handed down its opinion in this case showing the rule laid down in the case of *Farrar* v. *Wheeler, supra*, and *Calaf* v. *Fernandez*, 239 Fed. 795, cited in plaintiff's brief, both of which are from the First Circuit, is still adhered to.

The rules laid down in the above cases are expressed in the syllabus of each; Section 4 of the syllabus on rehearing in the Farrar case is as follows:

> "Rev. St. #701, provides that the Supreme Court may affirm, modify, or reverse any judgment, decree, or order of a Circuit Court lawfully brought before it for review, or may direct such judgment, decree, or order to be rendered or such further proceedings to be had by the Inferior Court as the justice of the case may require. Held, that where, in an action for injuries to an infant, the only error in the judgment related to the assessment of damages, the Circuit Court of Appeals had jurisdiction on reversal to limit a retrial to the question of damages."

It will be observed that this opinion is based on Revised Statutes, Section 701, referred to in plain-

tiff's brief, which section of the Revised Statutes was evidently overlooked by the learned judge of the Third Circuit in his opinion in the McKeon case, *supra*. The opinion does refer to Sections 721 and 914 of the Revised Statutes, which empowers the Federal Courts to follow state procedure. In reading the decision we are constrained to observe that while the learned Court defended the right of trial by jury, even to the extent of quoting early decisions which had to do with the sentiment connected with such right, we insist in the opinion the Court does not logically answer its own questions. The questions it asks itself are:

> "First, was the action of the Court below in following the New Jersey statute warranted by the federal statutes above cited?
>
> "And, secondly, if not so, was the restricted jury trial in the Court below one which deprived the defendant of its constitutional rights that 'the right of trial by jury shall be preserved?'"

The learned Court in undertaking to answer its own questions asks another question and then undertakes to answer the questions by citing numerous authorities which sustain the right of trial by jury, but none of which authorities have to do with the question of the right of a Court to remand a case for retrial on the question of damages only.

It is not convincing to us that it is necessary, as the Court says, to have twenty-four jurors pass on each question involved in the case in order to say that the complaining party has had a jury trial and been accorded his full constitutional rights. If twelve men have passed on a given disputed question in the case

which can be determined independent of other questions involved therein, though the court refers such other questions back to the jury for a new consideration or a new trial before twelve additional jurors, and this because the Trial Court erred on the one point only which caused the reversal as to that question, it could not be contended that the complaining party had been deprived of his right to trial by jury upon any disputed question in the case.

Therefore, while the facts in the McKeon case are somewhat similar to the case at bar, there is nothing in reasoning of the opinion or the authorities cited therein which touches the vital point involved here, and while the many authorities are cited, so far as we can read from the opinion we see no conflict between the authorities cited in the McKeon case and the opinion rendered in the various cases above referred to from the First Circuit.

We are not contending against the general rule as defined and set out in the cases, *Capital Traction Company* v. *Hof*, 174 U. S. 1, 43 L. Ed. 873, *Slocum* v. *New York Life Insurance Company*, 228 U. S. 364, 57 L. Ed. 879, *Liberty Oil Company* v. *Condon National Bank*, 260 U. S. 235, 67 L. Ed. 232, for in none of these cases is there decided the specific point in controversy here, but only the question of the right to have the jury pass upon the facts instead of the Court.

Plaintiff has cited the case of *Slocum* v. *New York Life Insurance Company*, 228 U. S. 364, 57 L. Ed. 879, in support of its proposition that the rules of the common law as understood in England at the time

the Federal Constitution and seventh amendment were adopted, still obtain. With this argument we take no exception providing the case is such that it becomes mandatory under the law to apply the common law procedure.

Plaintiff also quotes at length from the opinion of Mr. Justice Van Devanter in this case but fails to differentiate between the Slocum case and the case at bar. Reading from the body of the opinion we find this language:

> "It becomes necessary, therefore, to consider whether that Court should have directed a new trial instead of a judgment on the evidence contrary to the verdict."

Quoting further from the opinion of the Court:

> "That what was done may be clearly in mind it is well to repeat that, while on the trial in the Circuit Court, the jury returned a general verdict for the plaintiff, the Circuit Court of Appeals, on an examination of the evidence, concluded that it was not sufficient to sustain the verdict, and on that ground directed a judgment for the defendant. In other words, the Circuit Court of Appeals directed a judgment for one party when the verdict was for the other, and did this on the theory, not that the judgment was required by the state of the pleadings, but that it was warranted by the evidence."

Here it will be clearly seen that this case can have no bearing upon or application to the case under consideration, for, it is plainly set forth that the Court invaded the province of the jury by entering a judgment on the evidence and contrary to the jury's finding, but in our case under consideration the Court

enters a judgment in conformity with the verdict of the jury and reverses the case for retrial only insofar as it covers the amount of damages, which could not be fairly ascertained by the jury on account of an erroneous instruction given to the jury by the Trial Court.

Mr. Justice Van Devanter enters into a lengthy and learned discussion of the right of trial by jury in the following pages of the opinion, in all of which we heartily concur.

We notice that plaintiff calls attention in its brief to the case of *Ballew* v. *United States,* 160 U. S. 187, 40 L. Ed. 388, wherein plaintiff suggests that some of the language used therein by the learned Chief Justice White must be reconsidered in the light of this Court's subsequent opinion in the case of *Slocum* v. *New York Life Insurance Company, supra.*

In reading the two cases, we are constrained to suggest that plaintiff has overlooked the specific point decided in the Slocum case, and that the opinion in the Ballew case in nowise conflicts with the opinion in the Slocum case.

The plaintiff has cited four other cases in its brief which is admitted sustain the rule established in the First Circuit, and which was applied in this case in remanding the case for a new trial on the one question of damages only.

The first case referred to is *Original Sixteen To One Mine, Inc.* v. *Twenty-one Mining Co.,* 254 Fed. 630.

In the body of the opinion the Court says:

"If the jury finds in favor of the plaintiff, and there is no dispute over the amount of the

recovery, it seems somewhat technical to deny to the Court the power to supply the omission from the undisputed facts, but such seems to be the law of the land. It does not follow from this, however, that a new trial must be granted as to every issue in the case. There was no uncertainty in the verdict, in so far as the jury found for the plaintiff, thus establishing its title to the vein and its right to damages. I see no reason why that issue should be submitted to another jury, with little likelihood that a different result would be obtained. The power of a Court to grant a new trial as to a single issue in a case is well settled in the State of California and in the Federal Courts. *San Diego Land, etc., Co.* v. *Neale,* 78 Cal. 63, 20 Pac. 372, 3 L. R. A. 83; *Duff* v. *Duff,* 101 Cal. 1, 35 Pac. 437; *Estate of Everts,* 163 Cal. 449, 125 Pac. 1058; *Calaf* v. *Fernandez,* 239 Fed. 795, 152 C. C. A. 581."

The Court further commenting says that the case is one which peculiarly calls for the exercise of the discretion of the Court in awarding a new trial as to the single issue only. So it may be argued here, that is, the jury was misdirected by the charge of the Court as to one matter only, to-wit, the law covering the rule of damages, and since all other questions were submitted to the jury and the Appellate Court found no error in the instruction as to any other matter submitted, the same reason would apply for remanding the case for trial on the one issue in the First Circuit as it would in the Federal Court in California in the case last above cited.

The next case referred to in plaintiff's brief is the case of *Thorpe* v. *National City Bank of Tampa,*

274 Fed. 200, and is an opinion from the Circuit Court of Appeals, Fifth Circuit.

The learned judge in sustaining our contention in setting aside only a part of a judgment, where embracing different items, points out the statutory power of the Court to do so.

We believe the plaintiff has confused the power given by Federal statute to Courts to affirm, modify, or reverse any judgment brought before it for review, as he applies this statute to certain cases.

We agree with learned counsel for the plaintiff that the statutory provision cannot, and, in fact, does not take away the right of trial by jury, and if a question of fact has not been tried by a jury, then it follows that a Court could not deny that right by reason of the statutory provision, but if a separate item has been tried by the jury then the constitutional provision has been satisfied, and the plaintiff cannot be heard to complain of being denied its constitutional right.

We quote here a portion of the opinion of the Court in the above case as follows:

> "This Court has power to affirm, modify, or reverse any judgment lawfully brought before it for review, or to direct such judgment to be rendered, or further proceedings to be had, as the justice of the case may require. *United States v. Ill. Surety Co.*, 226 Fed. 653, 664, 141 C. C. A. 409. Whatever may be the rule under the common law, where unmodified by statute, as to the power of a Court to grant a new trial in part, or as to a severable sum involved in the suit, we think there is no doubt as to the power of this

Court to set aside only a part of a judgment, where embracing different items, some of which are not in question. It is therefore quite clear that we are not required to set aside the judgment, so far as it awards the principal and interest on the note, and that the only question is: Should the judgment as to the $797.58, attorney's fees, be set aside? *Farrar* v. *Wheeler*, 145 Fed. 482, 486, 75 C. C. A. 386; *Insurance Co.* v. *Piaggio*, 16 Wall. 378, 387, 21 L. Ed. 358; *New York & C. Railroad Co.* v. *Estill*, 147 U. S. 591, 622, 13 Sup. Ct. 444, 37 L. Ed. 292."

In plaintiff's brief the case of *Chicago, Rock Island & Pacific Railroad Co.* v. *Stephens*, 218 Fed. 535, is referred to as supporting defendant's contention. This decision is from the Circuit Court of Appeals, Sixth Circuit.

In this case the issues were submitted to a jury and thereafter the case was remanded to determine the facts on one issue only and the right to do this is set out in that portion of the opinion which we here quote:

"What disposition then should be made of the case? If, after verdict and judgment and while the case was in control of the Court below, the plaintiff had sought to amend her declaration by appropriate and definite allegations, and to show that the Rock Island Company was in truth a corporation created in accordance with the laws of Arkansas, she would no doubt have been given opportunity to cure the defect in question. *Mexican Central Railway* v. *Duthie*, 189 U. S. 76, 77, 23 Sup. Ct. 610, 47 L. Ed. 715. It is true that the Chief Justice said in the course of the opinion in that case that if the petition had remained as it was originally framed, and the case had been car-

ried to the Circuit Court of Appeals, that Court 'would have been constrained to reverse the judgment and remand the cause for a new trial, with leave to amend;' but the orders of reversal in the cases there referred to seem to have been to remand the causes 'for further proceedings,' and not in terms for new trial (and see *Denny* v. *Pironi*, 141 U. S. 121, 124, 11 Sup. Ct. 966, 35 L. Ed. 657, and citations); and it is not perceived why the reversal of the judgment should necessarily include the setting aside of the verdict. Permitting the verdict to stand in a case like this and reversing the judgment, only to remand the cause with permission to frame and try an issue of fact with respect alone to diversity of citizenship, would no more deprive the defendant of the right of trial by jury than was done in the Duthie case, just cited (*Parker Washington Co.* v. *Cramer*, *supra*, 201 Fed. 880, 120 C. C. A. 116; *Toledo Traction Co.* v. *Cameron*, 137 Fed. 48, 54, 55, 69 C. C. A. 28 (C. C. A., 6th Cir.); *McEldowney* v. *Card*, (C. C.) 193 Fed. 475, 483, by Sanford, District Judge); and the trial court could then exercise its powers under Section 954 of the Revised Statutes (Comp. St. 1913, No. 1591) as completely as the trial court did in the Duthie case. Such a course as this is sanctioned even in criminal cases, where the sentence is erroneous. *Ballew* v. *United States*, 160 U. S. 187, 202, 203, 16 Sup. Ct. 263, 40 L. Ed. 388; *Haynes* v. *United States*, 101 Fed. 817, 820, 42 C. C. A. 34 (C. C. A., 8th Cir.); *Whitworth* v. *United States*, 114 Fed. 302, 305, 52 C. C. A. 214, (C. C. A., 8th Cir.); *Mitchell* v. *United States*, 196 Fed. 874, 878, 116 C. C. A. 436 (C. C. A., 9th Cir.)."

The fourth case cited by plaintiff and above referred to is the case of *Fentress Coal & Coke Co.* v. *Elmore*, 240 Fed. 328.

This case is also from the Circuit Court of Appeals, Sixth Circuit, and in passing on the question involved the Court says:

> "The application for rehearing also points out that the opinion inaccurately stated certain details of the injury; but we find no error material to the result.
>
> On its merits the application is denied. The order of affirmance will be set aside, and the judgment below, but not the verdict, is reversed, without costs of this Court to either party; and the case will be remanded for determining the question of jurisdiction. If, in manner to be determined by the Court below, plaintiff shall properly amend his declaration and establish the necessary diverse citizenship existing when the suit was commenced and when the removal was made the judgment will be reentered; if jurisdiction be not thus shown the case will be remanded to the state court."

Counsel has further called attention in plaintiff's brief to the early English and American cases, but none of these change the rule which is conceded, but over which the controversy is solely to the application of the rule.

In the case of *In Re Walter Peterson*, 253 U. S. 300, 64 L. Ed. 919, this Court in an opinion by Mr. Justice Brandeis says:

> "The command of the 7th Amendment that 'the right of trial by jury shall be preserved' does not require that old forms of practice and procedure be retained."

citing *Walker* v. *New Mexico & S. P. R. Co.*, 165 U. S. 593, 596, 41 L. Ed. 837, 841, and *Twining* v. *New Jersey*, 211 U. S. 78, 101, 53 L. Ed. 97, 107.

Further quoting, the opinion says:

> "It does not prohibit the introduction of new methods for determining what facts are actually in issue, nor does it prohibit the introduction of new rules of evidence. Changes in these may be made. New devices may be used to adapt the ancient institution to present needs and to make of it an efficient instrument in the administration of justice. Indeed, such changes are essential to the preservation of the right. The limitation imposed by the Amendment is merely that enjoyment of the right of trial by jury be not obstructed, and that the ultimate determination of issues of fact by the jury be not interfered with."

Plaintiff discusses the present case from the viewpoint that the issue of damages is not severable, or capable of retrial alone. If the rule established by the former decision of the Circuit Court of Appeals in the First Circuit, and the other courts as pointed out herein, are to be sustained, then the issue of damages is severable. Plaintiff admits, when it says in its brief that:

> "It may fairly be inferred that the jury's verdict must have been based upon a finding (a) that there was a contractual relation between defendant and plaintiff; (b) that said contract was breached by the plaintiff; and (c) that the defendant suffered damages certainly and proximately flowing from said breach,"

that the issues are severable, and no other conclusion could be arrived at but that the jury did find by its verdict that there was a contract and the contract was breached, and in this particular case the contract found to be breached was to furnish a vapor phase

treating system, royalty free and to determine separately the question of a breach and its violation; it is not necessary for the jury to determine what items of damage resulted from such violation, therefore, the items of damage are severable.

The evidence here shows a calculation of lost profits based upon the representation by plaintiff with reference to the return in profits should the defendant purchase its patented cracking process, and the calculations for lost profits made at the trial are based absolutely upon the figures and method of calculation furnished by the plaintiff itself when it used such figures as an inducement to the defendant to purchase the right to use its process and in the item of lost profits, it so happens that the item of damage is such that it is not only severable, but the plaintiff itself severed it by its representations when it made the sale (Record pp. 716 to 724, Exhibit 1).

All the items mentioned by plaintiff in its brief, page 46, flow directly from the breach of the contract, and each item is a severable item as to the amount of damage, and each item together with the item of lost profits comes within the issues of a retrial granted by the Court for the purpose of determining the damages only, and the plaintiff is not precluded from offering its evidence against each and every one of these items and also its evidence in minimization of any damage which the defendant claims it sustained by reason of the breach.

We commend the diligence of counsel for plaintiff in calling attention in his brief to the adjudicated

cases and upon following him in a very exhaustive search we are unable to find any further adjudicated cases which support the defendant's contention so convincingly as those cited by plaintiff and herein quoted.

We submit to this Honorable Court that the Circuit Court of Appeals, in remanding the case for retrial on damages only, is within the rule and such action is not a violation of the Seventh Constitutional Amendment, and on this ground the Petition for Writ of Certiorari should be denied.

## II.

**Has the Circuit Court of Appeals for the First Circuit erred in applying the Maine law of set-off?**

In the outset we will not concede that it is necessary for the Federal Court to adhere absolutely to the statutory law of Maine with reference to the defendant's right to file its counterclaim in set-off in this case.

Defendant contends, as both a matter of fact and a matter of law, that plaintiff cannot here question the defendant's right of set-off inasmuch as it permitted this question to be adjudicated in the first appeal taken to the Circuit Court of Appeals in this case (29 Fed. 2nd 331).

In that case which was not appealed from by the plaintiff the Court said,

> "It is clear that the defendant's right of counterclaim or set-off is not to be determined on any narrow or technical construction of the Maine statute as to set-off."

The Circuit Court of Appeals in this first opinion, applied some permissible principles of equity in a jury case when it said,

> "We think the same principle is, on this record, here applicable; and justice demands such procedure, even if the defendant's damages are not technically ascertainable by calculation. This case falls under the doctrines clearly laid down by the Supreme Court of New Hampshire in *Johnson* v. *White Mountain Creamery Ass'n*, 68 N. Y. 437, 36 A. 13, 73 Am. St. Rep. 610. We find nothing in the decisions of the Supreme Court of Maine inconsistent with the result there reached."

Thereupon, the Court having adjudicated the defendant's right to file its counterclaim and been heard upon the same, and such adjudication not being appealed from by the plaintiff, in this case it became fixed and cannot now be raised as a ground for granting a Writ of Certiorari.

In the opinion on the first appeal the Court quotes from Chief Justice Fuller in the case of *Scott* v. *Armstrong*, 146 U. S. 499, 36 L. Ed. 1059, as follows:

> "The right to assert set-off at law is of statutory creation, but courts of equity from a very early day were accustomed to grant relief in that regard independently as well as in aid of statutes upon the subject."

Therefore, in applying a statute as in this case with reference to procedure where the Court has said that it is, "really a requirement of substantive justice," the Court has a right to exercise its equity powers in asserting a liberal interpretation of the right of set-off.

The Court also calls attention to the fact that the Judicial Supreme Court of Maine has recognized the same doctrine and cites the cases of *Rodick* v. *Pineo*, 120 Me. 160, 113 A. 45, and *Peterson Oven Co.* v. *Fickett*, 121 Me. 413, 117 A. 575.

In the case of *Morse* v. *Moore*, 83 Me. 473, 22 A. 362, referred to in the opinion of the Court, we find this language approving the former case of the Maine court in *Rogers* v. *Humphrey*, 39 Me. 383:

> "It is there held that 'when a party seeks to recover payment for articles delivered under a special contract which he has not fully performed, the damages suffered by such breach may legally be deducted in the same suit.'"

The Court goes on to say that in fact the same principle is sustained in *Peabody* v. *Maguire*, 79 Me. 572.

In the case of *Roberts* v. *Cooper*, 61 U. S. 467, 15 L. Ed. 969, the rule is laid down with reference to adjudication where a case has been appealed on the second writ of error.

We quote the following from the syllabus:

> "After a case has been brought here and decided, and a mandate issued to the Court below, if a second writ of error is sued out, it brings up for revision nothing but the proceedings subsequent to the mandate.
>
> None of the questions which were before the Court on the first writ of error, can be reheard or examined upon the second."

It is our conclusion then that the matter of procedure has not only been adjudicated against the plain-

tiff, but that the decision in the first instance was correct and, indeed, it seems to be the only sensible holding for the Federal Courts since the matter of the right of set-off is more than mere procedure, but it involves a substantive right to the defendant, and, furthermore, the plaintiff has not been prejudiced but has had its day in court with the same rights preserved as if defendant had instituted a separate action against plaintiff for its damages sustained.

The discussion set forth in the first opinion in this case, a part of which we have here quoted, seems to be the one way in which defendant may have all of its rights fully preserved while plaintiff is not prejudiced thereby, and the opinion is also in conformity with the later tendency of all courts and especially our Federal Courts to look more to substantive justice than to technical rules of procedure which is as it should be, and this is done not only in courts of equity, but in law courts in the exercise of their equitable jurisdiction.

In conclusion, in Section II of the brief, we call the Court's attention to the rules as laid down in Simkins Federal Practice (R. E.) at page 984:

> "An appellee may file a cross appeal at the same time with appellant's appeal, or he may file it at any time within the time limit, but the same rules regarding assignments of error and procedure in appeals must be pursued, without reference to appellant's appeal."

On the first appeal the plaintiff did not take advantage of this rule and therefore, as a matter of fact, there being no cross appeal, the matter of the pro-

cedure was adjudicated by the trial court by overruling the plaintiff's Motion to Strike the defendant's Counterclaim in Set-off, however, the appellate court passed on the same question sustaining the lower court and no appeal was taken by plaintiff from the decision of the appellate court.

The plaintiff, therefore, is not entitled to be granted its Writ of Certiorari on its second ground.

III.

**Did the court err in applying the Oklahoma law as to interest on unliquidated damages?**

Since the matter of interest is an element of damage which the Court must reconsider in a retrial of the question of damages only, the matter of interest if in error, will no doubt be corrected at a retrial of the issue of damages, and the plaintiff has lost nothing and no final adjudication stands against it on this question.

IV.

**Did the evidence warrant the submission of the case to the jury?.**

The evidence as disclosed by the record is so convincing and so conclusive as to each material question necessary to establish the contract, its breach, and the resultant damage, we do not believe that counsel for plaintiff seriously contend for this point.

We are so convinced from the evidence that the Court here will adopt our view as did the Circuit Court of Appeals, that we desire to rely on that conviction and submit the record.

V.

**Did the Circuit Court of Appeals err in holding that the defendant did, on the weight of the evidence, make out a claim for substantial sum of lost profits as damages?**

The Petition for the Writ of Certiorari should be denied on this ground for the reason that the verdict of the jury as to damages which includes the question of lost profits, has been remanded for retrial and all the rights of the plaintiff can be saved in the retrial, and as no final judgment has been entered against it for damages, it has lost nothing and we deem it here only to burden the record to enter into an argument of when and how lost profits may become a proper element of damage.

The record in this case speaks for itself, and since the plaintiff delivered to the defendant such an elaborate computation of anticipated profits if defendant would only purchase plaintiff's patented cracking process, the defendant, would, without doubt, realize all of these profits as set forth in plaintiff's computation. (See Record Exhibit 1.)

**Conclusion.**

We respectfully submit to this Honorable Court that the plaintiff's Petition for Writ of Certiorari should be denied.

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# SUPREME COURT OF THE UNITED STATES.

No. 362.—October Term, 1930.

Gasoline Products Company, Inc., Petitioner, *vs.* Champlin Refining Company. | On Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

[May 18, 1931.]

Mr. Justice Stone delivered the opinion of the Court.

Petitioner brought suit in the District Court for Maine, to recover royalties alleged to be due under a contract by which it licensed respondent to use two "Cross cracking units", structures adapted to the use of the "Cross cracking process" for increasing the production of gasoline from crude oil. Respondent pleaded, by way of counterclaim, in two separate counts, a contract by petitioner to construct a "Cross vapor treating tower" for treatment of gasoline, produced by the cracking units, necessary to make it marketable. The consideration for this contract was alleged to be the execution of the license contract already referred to and of two related contracts, one by a third party for the construction of the cracking units, and another by which petitioner guaranteed that they would work. Performance of these contracts is admitted.

Both counts of the counterclaim were based on the same series of transactions. The first alleged a contract arising from an oral proposal by petitioner's vice president in January, 1926, to construct for respondent a Cross vapor system treating tower, the cost of which was to be repaid by respondent to petitioner if the tower functioned in a satisfactory manner. This proposal was alleged to have been accepted by the execution of the other contracts. The second count alleged a written proposal of like tenor by petitioner to respondent, accepted by respondent on February 6, 1926, and confirmed by the later execution of the other contracts. Both counts charged that by reason of petitioner's failure to construct the treating system, and pending the construction of a substitute system by

respondent, the latter was compelled to store large quantities of the cracked gasoline awaiting treatment, resulting in four principal items of damage: the expenses of storage; depreciation of the gasoline by evaporation and other causes; the loss incident to shutting down respondent's plant because of the lack of treating apparatus; and the loss of anticipated profits from the sale of gasoline.

The jury returned a verdict on petitioner's cause of action, and a verdict for respondent on the counterclaim, leaving a balance in petitioner's favor for which the District Court gave judgment. The Court of Appeals for the First Circuit reversed because of errors in the charge of the trial court with respect to the measure of damages on the counterclaim; but in directing a new trial, it restricted the issues to the determination of damages only, 39 F. (2d) 521, following in this respect its earlier decisions in *Farrar* v. *Wheeler*, 145 Fed. 482; *Calaf* v. *Fernandez*, 239 Fed. 795; *Atteaux & Co.* v. *Pancreon Mfg. Corp.*, 22 F. (2d) 749. See also, adopting the same practice, *Original Sixteen to One Mine* v. *Twenty-one Mining Co.*, 254 Fed. 630; *Thorpe* v. *National City Bank*, 274 Fed. 200; *Chicago, R. I. & P. Ry. Co.* v. *Stephens*, 218 Fed. 535; *Fentress Co.* v. *Elmore*, 240 Fed. 328; *Great Western Coal Co.* v. *Railway Co.*, 98 Fed. 274; see *Empire Fuel Co.* v. *Lyons*, 257 Fed. 890, 897. This Court granted certiorari, 282 U. S. —, October 20, 1930, to review the single question whether the court below erred in thus limiting the new trial, upon a petition setting up a conflict of the decision with that of the Court of Appeals for the Third Circuit in *McKeon* v. *Central Stamping Co.*, 264 Fed. 385. See also *Kean* v. *National City Bank*, 294 Fed. 214, 226.

Petitioner contends that the withdrawal from consideration of the jury, upon the new trial, of the issue of liability on the contract set up in the counterclaim, is a denial of its constitutional right to a trial by jury. The Seventh Amendment provides: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." It is argued that as, by the rules of the common law in force when the Amendment was adopted, there could be no new trial of a part only of the issues of fact, a resubmission to the jury of the issue of damages alone is a denial of the trial by jury which the Amendment guarantees.

It is true that at common law there was no practice of setting aside a verdict in part. If the verdict was erroneous with respect to any issue, a new trial was directed as to all.[1] This continued to be the rule in some states after the adoption of the Constitution;[2] but in many it has not been followed, notwithstanding the presence in their constitutions of provisions preserving trial by jury. The Massachusetts courts early modified it to permit a new trial of less than all the issues of fact when they were clearly separable. *Bicknell* v. *Dorion,* 16 Pick. 478; see *Simmons* v. *Fish,* 210 Mass. 563, 565. The rule as thus modified has been generally acepted in the New England states, see *Zaleski* v. *Clark,* 45 Conn. 397, 404; *McKay* v. *New England Dredging Co.,* 93 Maine 201; *Lisbon* v. *Lyman,* 49 N. H. 553, 582 *et seq.; Clark* v. *N. Y., N. H. & H. R. R.,* 33 R. I. 83; *Pariso* v. *Wilson,* 101 Vt. 514, and consistently followed by the Court of Appeals for the First Circuit.

Lord Mansfield, in applying the common law rule where the verdict, correct as to one issue, was erroneous as to another, said: ". . . . for form's sake, we must set aside the whole verdict . . ." *Edie* v. *East India Co.,* 1 W. Bl. 295, 298. But we are not now concerned with the form of the ancient rule. It is the Constitution which we are to interpret; and the Constitution is concerned, not with form, but with substance. All of vital significance in trial by jury is that issues of fact be submitted for determination with such instructions and guidance by the court as will afford opportunity for that consideration by the jury which was secured by the rules governing trials at common law. See *Herron* v. *Southern Pacific Co.,* — U. S. —, decided April 13, 1931. Beyond this, the Seventh Amendment does not exact the retention of old forms of procedure. See *Walker* v. *Southern Pacific R. R. Co.,* 165 U. S. 593, 596. It does not prohibit the introduction of new methods for ascertaining what facts are in issue, see *Ex parte Peterson,* 253 U. S. 300, 309, or require that an issue once correctly determined, in accordance with the constitutional command, be tried a second

[1]Parker v. Godin, 2 Strange 813; Swain v. Hall, 3 Wilson 45; Berrington's Case, 3 Salk. 362; Bond v. Spark, 12 Mod. 275.

[2]Boswell v. Jones, 1 Wash. 322 (Va. 1794); Gardner's Administrator v. Vidal, 6 Rand. 106 (Va. 1828); Sawyer v. Merrill, 10 Pick 16 (Mass. 1830); Tuttle v. Gates, 24 Maine 395 (1844); Knowles v. Dow, 22 N. H. 387, 411 (1851).

time, even though justice demands that another distinct issue, because erroneously determined, must again be passed on by a jury.

If, in the present case, the jury has found, in accordance with the applicable legal rules, the amount due to petitioner on the contract for royalties and all the elements fixing its liability on the treating plant contract, there is no constitutional requirement that those issues should again be sent to a jury, merely because the exigencies of the litigation require that a separable issue be tried again. Such is not the effect of *Slocum* v. *New York Life Insurance Co.*, 228 U. S. 364, which decided only that an appellate federal court may not direct judgment *non obstante veredicto*, solely because the verdict given is not sustained by the evidence, but in that event must order a new trial. There it was held that the Seventh Amendment does not permit the entry of judgment on a trial at law before a jury upon an issue of fact, without the verdict of the jury. Here we hold that where the requirement of a jury trial has been satisfied by a verdict according to law upon one issue of fact, that requirement does not compel a new trial of that issue even though another and separable issue must be tried again.

As the issues arising upon petitioner's cause of action on the royalty contract are clearly separable from all others and the verdict as to them already given is free from error, it need not be disturbed. But the question remains whether the issue of damages is so distinct and independent of the others, arising on the counterclaim, that it can be separately tried. The verdict on the counterclaim may be taken to have established the existence of a contract and its breach. Nevertheless, upon the new trial, the jury cannot fix the amount of damages unless also advised of the terms of the contract; and the dates of formation and breach may be material, since it will be open to petitioner to insist upon the duty of respondent to minimize damages.

But it is impossible from an inspection of the present record to say precisely what were the dates of formation and breach of the contract found by the jury, or its terms. Different dates are alleged in the counterclaim as that of the contract—one, February 6, 1926; the other, the date of final execution of the related contracts, fixed by some of the testimony at March 20th. No date was set for performance, and what the jury, by its verdict, found to be the reasonable time for performance, is not disclosed by the record.

The contract alleged was to construct a single treating tower; but there was a sharp conflict in the testimony as to whether the oral proposal was for one, two, or three towers. To pass on the claim for loss of profits, the jury must know whether the contract to construct was the extent of the undertaking, and, if so, the number of towers to be built, or whether petitioner also agreed that the plant, whatever the number of towers, was to be adequate to treat all gasoline produced by respondent. In addition, the jury must know whether there was a guaranty that the treating system would work satisfactorily, or, if not, whether in fact it would have done so. But the present verdict, awarding as damages on the counterclaim less than the total of the items claimed by respondent, exclusive of alleged loss of profits, cannot be taken as establishing any of these material facts.

Where the practice permits a partial new trial, it may not properly be resorted to unless it clearly appears that the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice. See *Norfolk Southern R. R.* v. *Ferebee*, 238 U. S. 269, 274; *American Locomotive Co.* v. *Harris*, 239 Fed. 234, 240; *Simmons* v. *Fish*, *supra*, p. 568; *McBride* v. *Huckins*, 76 N. H. 206, 213; *General Motors Co.* v. *Shepard Co.*, 47 R. I. 153, 156; *Lefebvre's Administrator* v. *Central Vermont Ry. Co.*, 97 Vt. 342, 358. Here the question of damages on the counterclaim is so interwoven with that of liability that the former cannot be submitted to the jury independently of the latter without confusion and uncertainty, which would amount to a denial of a fair trial. See *Simmons* v. *Fish*, *supra*. There should be a new trial of all the issues raised by the counterclaim.

*Reversed.*

A true copy.

Test:

*Clerk, Supreme Court, U. S.*